Supreme Court, U.S.
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No. 02 397

IN THE

Supreme Court of the United States

DELOITTE & TOUCHE LLP, ET AL.,

Petitioners,

v.

GABRIEL DIRIENZO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit erred in adopting a subjective, motives-based test for *forum non conveniens* that affords a strong presumption favoring plaintiffs' choice of forum in a transnational class action when plaintiffs have sued as representatives of a class, many class members reside outside the forum and outside the United States, and plaintiffs seek to avoid the substantive disadvantages of proceeding in a foreign forum.

PARTIES TO THE PROCEEDING

The following parties, petitioners in this Court, were defendants-appellees in the court below or are successors in interest to parties that were defendants-appellees in the court below:

Allen Fracassi, Philip Fracassi, Marvin Boughton, John Woodcroft (erroneously listed in the caption in the opinion of the court below as John Woodcraft), Colin H. Soule, Norman Foster, Felix Pardo, Howard L. Beck, Ray Cairns, William E. Haynes, Robert L. Knauss, Derrick Rolfe, and Herman Turkstra; and

Salomon Smith Barney Inc. (successor in interest to Salomon Brothers, Inc., Smith Barney Inc., and the investment banking unit of Schroder & Co., Inc.); Merrill Lynch, Pierce Fenner & Smith Incorporated; Deutsche Bank Alex. Brown (f/k/a/ BT Alex. Brown Incorporated); Morgan Stanley Dean Witter & Co. (successor in interest to Morgan Stanley & Co., Incorporated); CIBC World Markets Corp. (f/k/a/ CIBC Oppenheimer Corp.); Credit Suisse First Boston Corporation; Donaldson, Lufkin & Jenrette Securities Corporation; Lehman Brothers Inc.; ABN AMRO Incorporated (successor in interest to Furman Selz LLC); Arnhold & S. Bleichroeder, Inc.; Blackford Securities Corp.; First Albany Corporation; McDonald & Company Securities, Inc.; Janney Montgomery Scott Inc.; and Wm Smith Securities, Incorporated (collectively the "Underwriter Petitioners").

In addition, petitioner Deloitte & Touche LLP was erroneously listed in the caption in the opinion of the court below as Deloitte & Touche, Chartered Accountants.

The following parties, respondents in this Court, were plaintiffs-appellants in the court below: Gabriel DiRienzo; Alan Bilgore; Paul Blanchard; Robert Gans, IRA; Robert Gans; A. Carl Helwig; Barry Zemel; Gregory N. Mappus; Herb Sudzin; Vincent Ditrano; Bruce E. Toll, IRA; Bruce E.

Toll; Jane Lanzo; Lou Lanzo; Internet Capital, Inc.; Deborah Mieczkowski; Joseph H. Misiewicz; Colin Low; Hazel M. O'Brien; Douglas Schmidt; Charles K. Fasold; Richard Greve; Grace Shum; Ronald Glotzer; Richard Hershey; Ronald McElroy; Charles Miller; Deborah S. Greve; Robert W. Hillger; Carol F. Brink Revocable Trust; William R. Brink, IRA; William R. Brink Revocable Trust; Walter Chompski; Bradwal Investments Ltd.; Local 138, 138A & 138B International Union of Operating Engineers Fringe Benefit Funds; Melvyn B. Fliegal; James Collins; Albert Solkov; Michael and Sophia Isaacs; Lee Pitman; Kenneth Hare; Thomas Leth; Levi Sabol; and Lawrence M. Siegel.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the petitioners that are corporations make the following disclosures:

Petitioner Arnhold & S. Bleichroeder, Inc. states that its parent is Arnhold & S. Bleichroeder Holdings, Inc. and that no publicly traded company holds 10% or more of its stock.

Petitioner Blackford Securities Corp. states that its parent is the Sanders Morris Harris Group and that no publicly traded company holds 10% or more of its stock.

Petitioner Deutsche Banc Alex. Brown (f/k/a BT Alex. Brown Incorporated) states that its parent is Deutsche Bank AG and that no other publicly traded company holds 10% or more of its stock.

Petitioner CIBC World Markets Corp. (f/k/a CIBC Oppenheimer Corp.) states that it is a wholly owned subsidiary of CIBC World Markets Holdings, Inc.

Petitioner Credit Suisse First Boston Corporation states that it is a wholly owned subsidiary of Credit Suisse First Boston (USA), Inc., a wholly owned subsidiary of Credit Suisse First Boston, Inc., which is jointly owned by Credit Suisse First Boston and Credit Suisse Group.

Petitioner Donaldson, Lufkin & Jenrette Securities Corporation states that it is a wholly owned subsidiary of Credit Suisse First Boston (USA), Inc., a wholly owned subsidiary of Credit Suisse First Boston, Inc., which is jointly owned by Credit Suisse First Boston and Credit Suisse Group.

Petitioner First Albany Corporation states that it is a wholly owned subsidiary of First Albany Companies Inc. and that no publicly traded company holds 10% or more of its stock.

Petitioner ABN AMRO Incorporated states that in 1998, Furman Selz LLC merged with ING Baring Securities, Inc. to become ING Baring Furman Selz LLC. In 1999, ING Baring Furman Selz LLC changed its name to ING Barings LLC, which was sold to ABN AMRO and renamed ABN AMRO Securities LLC. In March 2002, ABN AMRO Securities LLC was dissolved via merger into ABN AMRO Incorporated. ABN AMRO Incorporated is wholly owned by ABN AMRO WCS Holding Company, which is wholly owned by ABN AMRO North America Holding Company, which in turn is wholly owned by ABN AMRO Bank N.V.

Petitioner Janney Montgomery Scott Inc. states that it is a wholly owned subsidiary of Independence Square Properties, LLC, which is a subsidiary of the Penn Mutual Life Insurance Company.

Petitioner Lehman Brothers Inc. states that it is a wholly owned subsidiary of Lehman Brothers Holdings Inc.

Petitioner McDonald & Company Securities, Inc. states that its parent is KeyCorp. and that no publicly traded company holds 10% or more of its stock.

Petitioner Merrill Lynch, Pierce Fenner & Smith Incorporated states that it is a wholly owned subsidiary of Merrill Lynch & Co. Inc.

Petitioner Morgan Stanley Dean Witter & Co., Inc. states that it is the successor in interest to Morgan Stanley & Co., Incorporated, that it has no parent corporation, and that no publicly held company holds 10% or more of its stock.

Petitioner Salomon Smith Barney Inc. states that it is the successor in interest to Salomon Brothers, Inc., Smith Barney Inc., and the investment banking unit of Schroder & Co., Inc., and that it is a wholly owned subsidiary of Salomon Brothers Holding Company, Inc., which is a wholly owned subsidiary of Salomon Smith Barney Holdings Inc., which is a wholly owned subsidiary of CitiGroup Inc.

Petitioner Wm Smith Securities, Incorporated states that it has no parent and that no publicly traded corporation holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Deloitte & Touche LLP ("Deloitte"), et al., respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The decision below conflicts with this Court's *forum non conveniens* jurisprudence and the law of ten other circuits. The decision below, issued by the circuit that oversees most of the significant securities class action litigation in the United States as well as a substantial number of non-securities class actions, substitutes for traditional *forum non conveniens* analysis a wide-ranging inquiry into the parties' subjective motives. This inquiry is incompatible with the controlling principle of *forum non conveniens* adjudication: "to ensure that the trial is convenient." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

The Second Circuit's subjective *forum non conveniens* test all but ignores critical factors, including the plaintiffs' representative status and the residence of many plaintiffs outside the United States—factors previously identified by this Court as inconsistent with a presumption that the plaintiffs' chosen forum is in fact convenient for the trial of the action. The Second Circuit's test conflicts with this Court's holdings in *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947), and *Piper* that plaintiffs suing in a representative capacity and foreign plaintiffs are entitled to less deference regarding forum choice than individual plaintiffs who actually reside in the forum.

At the same time, the Second Circuit—in violation of the rule in *Piper* that a change in substantive law should not be given substantial weight—places near-decisive emphasis on the perceived need to adjudicate in the courts of the United States any disputes with a United States nexus. 454 U.S. at 247. The result is a protectionist framework that inappropriately tilts resolution of forum selection in transnational class actions heavily in favor of United States courts. This Court's

review is needed to resolve the fundamental conflict between the Second Circuit framework and prior *forum non conveniens* case law, as well as to provide guidance to all federal courts on this important issue.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 294 F.3d 21. The initial opinion of the court of appeals (App., *infra*, 23a-76a), partially vacated on rehearing by the judgment under review, is reported at 232 F.3d 49. The opinion of the district court (App., *infra*, 77a-101a) is reported at 49 F. Supp. 2d 629.

JURISDICTION

This case arises under the federal securities laws. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on April 1, 2002. App., *infra*, 1a. On June 13, 2002, the court of appeals denied petitioners' timely petition for rehearing. *Id.* at 102a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Factual Background

Philip Services Corporation ("PSC") is a Canadian corporation incorporated in Ontario, Canada. Although PSC has since sold its operating assets, at all pertinent times PSC maintained its principal executive offices in Hamilton, Ontario, Canada. App., *infra*, 4a. PSC's stock was traded on the Toronto Stock Exchange, the Montreal Stock Exchange, the New York Stock Exchange, and the NASDAQ market. Most of the PSC shares traded during the class period were purchased on United States exchanges. *Id.*

In 1997, as part of its efforts to expand its operations, PSC acquired two U.S. companies—Allwaste, Inc., and Serv-Tech, Inc.—in stock-for-stock deals worth a total of approximately $560 million. *Id.* at 78a. In November 1997, PSC completed two secondary public offerings. One of these offerings, underwritten by eight Canadian securities firms and made only to investors outside the United States, raised approximately $94 million. The other offering, underwritten by seventeen American securities firms and made exclusively to U.S. investors, raised roughly $284 million. *Id.* at 78a-79a. In connection with these acquisitions and the U.S. public offering, PSC filed registration statements with the Securities and Exchange Commission (the "SEC"). *Id.* at 79a.

On January 26, 1998, PSC announced that it would take charges to earnings for 1997 of between $250 and $275 million. Over the next several months, this figure increased to $381.2 million, based in part on a $125 million overstatement of inventory. *Id.* PSC also issued revised financial statements for fiscal years 1995, 1996, and 1997 disclosing that 1995 earnings had been overstated by approximately $22.5 million and that 1996 earnings had been overstated by $48.3 million. *Id.* Due in part to these various announcements, the share price of PSC stock dropped approximately 80% between January and July of 1998. *Id.*

Based on these events, two lawsuits were filed in Ontario, Canada. In one case, a shareholder filed a class action, on behalf of all "persons in Canada who held and/or purchased common shares of [PSC] between February 28, 1996 and April 23, 1998," against PSC, Deloitte, and the Canadian underwriters. In the other case, PSC sued Robert Waxman, who was the former president of one of PSC's groups, as well as two individuals who had worked under Waxman, alleging fraud. *Id.*

II. Proceedings In The District Court

A. Consolidation Of Multiple Class Actions

In the United States, more than twenty class action lawsuits were commenced in various jurisdictions, some twelve of which were filed initially in the Southern District of New York and the remainder of which were filed in New Jersey and Pennsylvania. On motion of some of the petitioners, supported by some respondents (including those who had filed suit in New York) and opposed by other respondents (including some who had filed suit in New Jersey and Pennsylvania), all of the cases were transferred to the Southern District of New York by the Judicial Panel on Multidistrict Litigation (the "JPML") and consolidated for pre-trial purposes before Chief Judge Michael B. Mukasey. *Id.* at 80a. In their motion papers filed with the JPML, the moving petitioners informed the JPML that "[t]he location with the greatest focus in this dispute is not in the United States, but rather in Ontario, Canada, where [PSC] is headquartered." PSC Parties' Br. in Supp. of Transfer, at 12.

The consolidated class action complaint filed in the Southern District of New York asserts claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and SEC Rule 10b-5, alleging that PSC and its directors, all but four of whom live and work in Ontario, made materially false and misleading statements concerning its revenues, earnings, assets, and liabilities. The complaint contends that Deloitte, an Ontario partnership composed entirely of Canadian partners, is liable in connection with its 1995, 1996, and 1997 audits of PSC. The complaint also alleges that the seventeen petitioner underwriters, which are based in the United States, though seven of the firms conduct business in Canada as well, are responsible for the November 1997 public offering. App., *infra*, at 80a. These claims are asserted on behalf of a putative class of all purchasers of PSC common stock and call options during the period from February 28, 1996

through May 7, 1998. The putative class includes Canadians and other persons who are not United States residents.

None of the petitioner PSC directors lives in New York. Two of the four became directors of PSC in August 1997 as a result of the acquisition of Allwaste and are named in only three paragraphs of the complaint. The seventeen underwriter petitioners are named in only two of the eleven claims in the complaint, and their liability is "entirely derivative" of the liability of PSC and the other Canadian defendants. *Id.* at 94a. In June 1999, PSC filed for protection under Chapter 11 of Title 11 of the United States Code in Delaware and under analogous provisions of Canadian law in Ontario. *Id.* at 7a.

B. Dismissal For *Forum Non Conveniens*

Deloitte and the other petitioners moved to dismiss the consolidated actions on the basis of *forum non conveniens*, arguing that Ontario is a more appropriate forum. The district court began its analysis by noting that although there is ordinarily a strong presumption in favor of a plaintiff's chosen forum, where, as here, respondents proceed in a representative capacity, their choice of forum is entitled to less weight. *Id.* at 81a (citing *Koster*, 330 U.S. at 524). The court then determined that Ontario is an adequate alternative forum. *Id.* at 91a.

The court addressed the public and private interest factors listed in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). As to the private interest factors, the court observed that the gravamen of the complaint "is that a Canadian company, with its directors, officers, underwriters and auditor, many of whom are Canadian, committed securities fraud by knowingly or recklessly overstating its copper inventory, overstating its earnings, understating its liabilities and failing to record known liabilities and inter-company transactions properly." App., *infra*, 93a. The court noted that "[m]ost of these activities took place in Ontario" and that "it is in On-

tario that most of the key witnesses and the vast bulk of relevant evidence can be found." *Id.* The court pointed out that "several important third-party witnesses are located in Canada who could be compelled to testify by an Ontario court, but not by an American court." *Id.* The court found that the "conduct of these parties is central to the allegations in plaintiffs' complaint, and their testimony will likely be crucial in resolving the dispute," a concern that takes on added importance in light of the centrality of live testimony in resolving fraud allegations. *Id.* Next, the court noted that "most, if not all, of the important defendants are located in Ontario," and the ones that are located in the United States "are less central to resolution of the dispute than the defendants located in Ontario." *Id.* at 94a, 95a. The court stated that "the vast bulk of the relevant documentary evidence is in Ontario" and that the few documents in the United States "do not compare, in either quantity or importance, to those located in Ontario." *Id.* at 95a. The court found that the private interest factors "strongly favor litigation in Ontario." *Id.* at 93a.

Concerning the public interest factors, the court concluded that most of the factors do not favor one forum over another. *Id.* at 96a. The court noted that the dockets of courts in both fora are congested and that in either forum the court would have to address some issues of foreign law. *Id.* The court found that the "'local interest in having localized controversies decided at home' weighs heavily in favor of litigation in Ontario," because "this case predominantly concerns the conduct of a major Canadian corporation in Canada, notwithstanding the involvement of some American entities and persons." *Id.* at 97a (quoting *Gilbert*, 330 U.S. at 509). Moreover, the court stated, "a class action lawsuit and an action brought by PSC itself are already pending in connection with this dispute in Ontario" and that it would therefore "be 'highly intrusive' for an American court to involve itself in a matter that has already engaged the judicial authorities of Canada." *Id.* (citation omitted). Recognizing that

the interest of the United States in applying its own securities laws was a "consideration to be weighed in the totality of the *Gilbert* analysis," the court noted that Canada had a similar interest and that this country's interest was therefore "far from overriding." Having considered the countries' similar interests in applying their own securities laws, but finding that the public and private factors weighed strongly in favor of Ontario, the court granted the motion to dismiss on the basis of *forum non conveniens*. *Id.* at 98a.

III. The First Split Decision In The Court Of Appeals

Respondents appealed to the Second Circuit. Although respondents argued that a Canadian forum would deprive them of the benefit of the fraud on the market theory of securities fraud and of U.S. class action procedures, the court of appeals unanimously affirmed the district court's finding that Ontario would be an adequate forum. App., *infra*, 11a, 37a. In its initial opinion, ("*DiRienzo I*"), however, the Second Circuit majority explicitly rejected the district court's reliance on *Koster*, holding that respondents' choice of forum was entitled to full deference. *Id.* at 42a. The majority took the position that *Koster* applies only in the context of shareholder derivative suits, not class actions. *Id.* at 39a.

Moreover, despite this Court's repeated admonition that the court of appeals should not engage in *de novo* review of the district court's findings, the majority rejected two of the district court's "public interest" holdings: (1) that the local interest factor weighed heavily in favor of Ontario; and (2) that the conflict of laws issue was neutral. The court cited the *amicus curiae* brief of the SEC, which took no position on the proper disposition of petitioners' *forum non conveniens* motion, but argued that the district court had given too little weight to the public interest in litigating claims for violations of U.S. securities laws in U.S. courts. The majority adopted the SEC's argument that dismissal in this case would be like dismissing a product liability case against

Toyota because the design and manufacture of an automobile took place in Japan. The majority concluded that "there is a strong public interest favoring access to American courts for those who use American securities markets." *Id.* at 48a.

The Second Circuit also rejected the district court's "private interest" determination that the access to evidence and witnesses weighed heavily in favor of Ontario, concluding instead that evidence and witnesses could readily be moved to New York and that "[a]lthough demeanor evidence is important when trying a fraud case before a jury, videotaped depositions, obtained through letters rogatory, would afford the jury an opportunity to assess the credibility of these Canadian witnesses." *Id.* at 50a-51a (citation omitted). The majority concluded that the "public and private interest factors have not overcome the strong presumption that must be accorded plaintiffs' choice of forum." *Id.* at 51a.

Judge Cabranes dissented vigorously, agreeing with only the portion of the decision finding Ontario to be an adequate forum. In his view, the majority ignored clear precedent holding that the interest of the United States in enforcing its securities laws "*is merely one consideration* to be weighed in the totality of the *Gilbert* analysis." *Id.* at 57a (citation omitted; emphasis added). "In demanding *heightened* consideration of the United States' interest, the majority substitutes its own views of the proper balance for those of the District Court, in plain disregard for our precedents and the applicable standard of review." *Id.* at 58a. He argued that the majority gave insufficient weight to the location of evidence and the need to have witnesses appear in court, especially in a fraud case, factors that favored trial in Ontario. *Id.* at 58a-61a.

Judge Cabranes faulted the majority's decision not to follow *Koster*, pointing out that the policies this Court articulated in *Koster*—which warrant limited deference to the choice of forum in a shareholder derivative action—apply

with full force to a class action. He noted that class and derivative actions are similar because "the lead plaintiffs assumed responsibility for representing the interests of many others," and the presumption of a convenient forum "makes little sense when the plaintiffs are dispersed across the nation and have had the forum selected for them by a representative plaintiff." *Id.* at 63a, 64a. According to Judge Cabranes, "[f]ollowing *Koster*, a district court should discount a plaintiff's forum choice after asking a single question: Is the plaintiff proceeding in a representative capacity that may diminish the presumed convenience of the chosen forum?" *Id.* at 64a.

IV. The Second Split Decision In The Court Of Appeals

Petitioners sought panel and en banc rehearing in *DiRienzo I*. On December 4, 2001, while the petition for rehearing in *DiRienzo I* remained pending, the en banc court issued a decision in an unrelated case, co-authored by Judge Cabranes, redefining the court's approach to *forum non conveniens*. In *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc), the Second Circuit established a "sliding-scale," motives-based approach to determining the deference to be afforded plaintiffs' choice of forum. *Iragorri* held, inter alia, that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." *Id.* at 71-72.

Petitioners brought *Iragorri* to the attention of the *DiRienzo I* panel, citing as evidence of respondents' forum shopping the respondents' and the panel's own acknowledgment of the substantive and procedural benefits respondents sought by litigating their securities fraud claims in a U.S. forum.[1]

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[1] In their original brief to the panel, respondents argued that dismissal in favor of Canada might "strip[] U.S. citizens of rights and protections afforded them under federal law" or require respondents to litigate under

Petitioners sought, among other things, a remand for reconsideration by the district court in light of the *Iragorri* standard. Ignoring this plea, some four months after the decision in *Iragorri*, the panel granted rehearing, vacated in part its earlier opinion, and issued a new, substantially revised opinion again reversing the district court, by the same 2-1 split.

This second panel decision ("*DiRienzo II*")—the judgment that petitioners now challenge in this Court—was driven by the inquiry into the parties' motives required by *Iragorri*. The majority began by purporting to pretermit the question whether less deference to respondents' choice of forum was appropriate under *Koster* because, "even were the district court correct, *Iragorri* posits that defendants' motion to dismiss should also be viewed with greater skepticism." App., *infra*, 9a. In the end, therefore, the majority afforded full deference to the respondents' choice of forum, stating that "unless the balance [of public and private interest factors] *strongly favors* defendant, plaintiffs' choice of forum

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"substantive and procedural law [that] is entirely different." Pls.' Br. 20. Among other things, respondents argued to the panel:

- that they would be prejudiced by the failure of Canadian law to recognize the fraud-on the-market theory of liability because "hundreds, if not thousands" of class members would be unable to prove individual reliance (*id.* at 21);
- that the need to prove individual reliance in Ontario would create "conceivably insurmountable procedural impediments" to class certification in Ontario (*id.* at 25); and
- that, under Canadian law, respondents would be "without any remedy against Deloitte, and wholly inadequate remedies against the individual Defendants." (*Id.* at 28 (emphasis omitted).)

The majority in *DiRienzo I* acknowledged that respondents "want this case tried in the Southern District of New York, not simply because they prefer that location, but because of the substantive benefits they perceive would ensue from trying this case in the United States." App., *infra*, 41a-42a. This sentence was deleted from *DiRienzo II*. *See infra* page 11.

'should rarely be disturbed,'" and that "[respondents] should not have been deprived of their choice of forum except upon defendants' *clear showing that a trial in the United States would be so oppressive and vexatious to them as to be out of all proportion to [respondents'] convenience*." *Id.* at 14a, 12a (citation omitted; emphases added).

The court stated that respondents' choice of forum was entitled to a strong favorable presumption because "plaintiffs offered a quite valid reason for litigating in federal court: *this country's interest* in having United States courts enforce United States securities laws." *Id.* 10a. (emphasis added).[2] In contrast with the supposedly benign motivation of the respondents in seeking to litigate their claims in U.S. courts, the court found petitioners' motives in seeking dismissal in favor of Canada suspect and held that the *Iragorri* sliding scale should thus tilt decisively against petitioners and in favor of respondents' choice. The court found it highly significant to this subjective motives inquiry that petitioners had sought multidistrict consolidation in the Southern District of New York pursuant to 28 U.S.C. § 1407.[3] The court questioned petitioners' "underlying motives," concluding that "[t]he way in which they have used procedural tactics ultimately to obtain dismissal of plaintiffs' suit in district court

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[2] Before *Iragorri* suggested that a plaintiff's search for substantive advantage would adversely affect the presumption favoring plaintiff's choice of forum, the panel majority in *DiRienzo I* had characterized the same interest as "the substantive benefits [respondents] perceive would ensue from trying this case in the United States." *See supra* note 1.

[3] The court of appeals apparently failed to recognize that certain petitioners, including Deloitte, had neither moved to transfer and to consolidate the various class actions in the Southern District of New York, nor even joined in the motion of other petitioners to do so. Nevertheless, the court did not differentiate among the moving and non-moving petitioners in questioning all petitioners' "procedural tactics" and "underlying motives." App., *infra*, 11a.

in favor of Canada counsels caution in evaluating their *forum non conveniens* motion." *Id.* at 11a.

After again approving the district court's conclusion that Ontario is an adequate forum (*id.*), the majority proceeded to apply its strong presumption favoring plaintiffs' choice of forum to the *Gilbert* private and public interest factors, both individually and collectively. Turning to the private interest factors, the court accepted the district court's findings that "the bulk of the relevant documents" and "most of the potential witnesses with direct knowledge of the alleged fraud are located in Ontario," but again stated that travel and videotaped depositions would suffice. *Id.* at 12a, 13a. The court used its strong, motive-based presumption favoring respondents' forum choice to discard the district court's evaluation of these key convenience factors.[4] The majority then used the same strong presumption to cast aside the district court's overall resolution of the private interest factors in petitioners' favor. It held that, although the balance of private interest factors was "close," especially in view of the importance of having live witnesses testify in a fraud case, "unless the balance strongly favors defendant, plaintiffs' choice of forum 'should rarely be disturbed.'" *Id.* at 14a (citation omitted).

The court then addressed the public interest factors, concluding that the district court's finding that local interests weighed heavily in favor of Ontario was clearly erroneous. *Id.* at 14a-15a. The court stated that "[r]eversal is further warranted in the circumstances presented here because the district court's ruling falls outside the permissible range of decisions, *once the interest of the United States in enforcing its securities laws is factored into the equation*," and that "[a] strong public interest favors access to American courts for

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[4] According to the majority, the district court had not offered a "satisfactory explanation" of why the transportation of documents or witnesses would be "oppressive" or "vexatious" to petitioners. App., *infra*, 12a.

those who use American securities markets." *Id.* at 18a (emphasis added). As it did in its first opinion, the court cited the SEC's *amicus curiae* brief analogizing this case to a product liability action against Toyota. Again the majority invoked its strong presumption favoring respondents' choice and "skepticism" about petitioners' motives to frame its evaluation of the combined private and public interest factors in respondents' favor. Petitioners, the court concluded, "have not met their burden of proving that litigation in the United States is unnecessarily inconvenient for them *to a degree much greater* than the convenience that would be afforded plaintiffs by trial in . . . New York." *Id.* at 19a. (emphasis added).

Judge Cabranes, the co-author of *Iragorri*, joined the majority's analysis of the deference owed to respondents' choice of forum. He agreed that under *Iragorri*, the proper focus is "on the legitimacy of plaintiffs' reasons for choosing the forum" and that the earlier JPML motion rendered petitioners' *forum non conveniens* motion suspect. *Id.* at 20a. With regard to the majority's analysis of the public and private interest factors, however, Judge Cabranes adhered to his dissent from the panel's original opinion, stating that he "cannot in good faith . . . support the rebalancing of the *Gilbert* factors in . . . the majority opinion." *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

The Second Circuit has adopted an approach to *forum non conveniens* motions that conflicts fundamentally with how this Court's precedents indicate such motions should be decided. As discussed below, this Court has stated that when an adequate alternative forum has been shown, the district courts are to balance the relative conveniences with respect to each forum. The first step in the process is to determine the appropriate level of deference the plaintiff's choice of forum is to receive. Ordinarily that choice receives a high degree of deference, but that deference is diminished where

the plaintiff sues in a representative capacity, *Koster*, 330 U.S. at 524, or is not a forum resident, *Piper*, 454 U.S. at 255-56. The next step is for the district court to balance in its sound discretion various public and private interests to see whether the balance points—either somewhat or heavily, depending on the degree of deference owed to the plaintiff's choice—in favor of the alternative forum. A plaintiff's desire to have a case litigated under the laws of a particular country is not entitled to substantial weight. *Piper*, 454 U.S. at 247. If the public and private factors sufficiently favor litigation in the alternative forum, the motion should be granted. *See, e.g.*, *Gilbert*, 330 U.S. at 508-09; *Koster*, 330 U.S. at 531-32; *Piper*, 454 U.S. at 248-49. This is the approach dictated by this Court's precedents, and this approach is followed by ten other circuits.

The Second Circuit's approach focuses instead on the *motives* that drove the plaintiff's decision to litigate in a particular forum, as well as the defendant's *motives* in seeking dismissal on the basis of *forum non conveniens*. This motives analysis employs a sliding-scale approach to the deference owed the plaintiff's choice of forum, incorporating such disparate factors as the desire to have United States securities law applied in United States courts, the residence of some class members in the United States, and whether the defendant can in any sense be accused of "forum shopping." The Second Circuit then applies its motives-based degree of deference to weigh the public and private interest factors, double-counting many of the considerations already weighed at the prior step in the analysis when determining appropriate deference to the plaintiff's choice of forum.

The Second Circuit refuses to discount a plaintiff's choice of forum when the plaintiff sues in a representative capacity or where the plaintiff is not a forum resident. Coupled with the positive weight given to a plaintiff's desire to avail itself of United States substantive and procedural law,

the undiscounted presumption afforded class representatives' preferred forum results in an essentially irrebuttable presumption weighing against *forum non conveniens* dismissal in class actions seeking relief governed at least in part by United States law. Moreover, according to the Second Circuit, this presumption applies with full force even when only some of the putative class members are residents of the United States.

The decision below dramatically illustrates, as early commentators recognized,[5] that the strength of the presumption or deference favoring plaintiffs' choice of forum, if not absolutely outcome determinative of *forum non conveniens* adjudication, as a practical matter weighs mightily in the balance. In *DiRienzo II*, the panel majority invokes its strong presumption no fewer than seven times in reversing Judge Mukasey's evaluation of the private and public interest factors. Indeed, the panel majority triple counts the strong presumption favoring respondents' choice of forum: once to discount individual private interest factors, such as the district court's finding that the bulk of relevant documents are located in Canada (App., *infra*, 12a); a second time to support the majority's resolution of all private interest factors in respondents' favor (*id.* at 14a); and a third time to frame its overall evaluation, in respondents' favor, of the combined private and public interest factors (*id.* at 19a).

This Court's review is needed in order to resolve the conflict between the Second Circuit's approach to *forum non conveniens* and the approach dictated by this Court's precedents and followed by the other courts of appeals. If allowed to stand, the Second Circuit's approach will result in parochial rulings that fail to give adequate weight to the interests

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[5] Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 416 (1947) ("The placing of the burden of proof is of major importance in the practical administration of the doctrine.").

of foreign litigants, witnesses, courts, and governments, all but ensuring that class actions with an arguable nexus to the United States will be litigated here regardless of the convenience factors stressed by this Court.

I. Review Is Warranted To Resolve The Conflict Over The Relevance Of Parties' Motives To *Forum Non Conveniens* Analysis

A. The Second Circuit's Approach

In the Second Circuit, once a defendant demonstrates the existence of an adequate alternative forum, the court must determine the "deference given to a plaintiff's choice of forum." *Iragorri*, 274 F.3d at 73. According to the Second Circuit, "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations." *Id.* at 71. "The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." *Id.* at 71-72. "[T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States," the Second Circuit held, "the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*." *Id.* at 72 (footnote omitted).

Applying *Iragorri*, the court below stated that "[a]lthough less than all of the named plaintiffs . . . reside in . . . New York, no evidence suggests that they had an improper motive in bringing suit there." App., *infra*, 9a-10a. "In fact," the court stated, "plaintiffs offered a quite valid reason for litigating in federal court: this country's interest in having United States courts enforce United States securities laws." *Id.* at 10a. The court also noted that the complaint was filed in the Southern District of New York because the

JPML had consolidated the cases there for pre-trial proceedings, and "nothing in the record suggests the filing was motivated by anything other than this order." *Id.*

The court observed that all parties agreed with or tacitly conceded the propriety of consolidated pre-trial proceedings, but the court concluded that because some of the petitioners had sought consolidation in New York rather than New Jersey or Pennsylvania, petitioners' "current claims of inconvenience raise questions as to their underlying motives," thereby warranting more deference to respondents' choice of forum. *Id.* at 11a. Ultimately, despite the plainly fictitious notion of the "convenience" of thousands of widely-dispersed class members of differing nationalities, the court granted full, undiminished deference to respondents' choice of forum. It concluded that *forum non conveniens* dismissal would be appropriate only if the balance of public and private interest factors "strongly favors" litigation in Ontario over New York and applied full deference in reversing the district court's evaluation of various private and public interest factors, individually and collectively. *Id.* at 19a.

B. This Court's *Gilbert* And *Piper* Decisions

In *Gilbert*, this Court established the framework for *forum non conveniens* analysis. The trial court, in its discretion, must weigh both private[6] and public[7] interest factors.

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[6] "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial." 330 U.S. at 508.

[7] "Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in

330 U.S. at 508-09. Ordinarily, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* The Court observed that "to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their case on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Id.* at 511.

In *Piper*, this Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247.[8] The Court noted that "by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law." *Id.* at 248-49. The Court suggested that a change in the law should be considered only in addressing whether "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," and thus that the alternative forum is not adequate. *Id.* at 254-55 & n.22.

The *Piper* Court added a further qualification to the *Gilbert* presumption favoring a plaintiff's choice of forum:

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congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself." *Id.* at 508-09.

[8] *See also Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir. 1991) (Breyer, C.J.); *Alfadda v. Fenn*, 159 F.3d 41, 45 (2d Cir. 1998).

"When the home forum[9] has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." *Id.* at 255-56. As a result, "a foreign plaintiff's choice deserves less deference." *Id.* at 256. Where the plaintiff's choice of forum is entitled to less deference, the defendant seeking dismissal must demonstrate only that "trial in the plaintiff's chosen forum would be burdensome." *Id.* at 259.

Notably, the petitioner in *Piper* had initially moved pursuant to 28 U.S.C. § 1404(a) for a transfer to a different district court, and the court granted that motion. The petitioner then sought dismissal on the basis of *forum non conveniens*. The respondent contended that seeking *forum non conveniens* dismissal after obtaining a § 1404(a) transfer indicated improper forum shopping that "should be taken into account in the analysis of the private interests." 454 U.S. at 252 n.19. This Court acknowledged that the petitioner-defendant may be engaged in reverse forum-shopping," but recognized that

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[9] The courts of appeals are divided on whether the "home forum" of a United States resident is the district in which the litigant resides, *see Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091-92 (9th Cir. 1998) (affording less deference to California plaintiffs suing in Hawaii: "none of the Plaintiffs are Hawaii residents"); *Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982) ("In the two actions, there are 157 plaintiffs, six of whom are United States citizens and residents. The Northern District of Illinois is not the 'home forum' for any."), or rather *any* district in the United States, *see Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) ("[T]he 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives."). The Second Circuit has adopted the latter view, exacerbating the circuit conflict on this question. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000) (citing *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 144-45 (2d Cir. 2000), for the proposition that the "'home forum' of an American citizen for *forum non conveniens* purposes is any 'United States court'"); *see also Iragorri*, 274 F.3d at 73 ("It is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district.").

"this possibility ordinarily should not enter into a trial court's analysis of the private interests." *Id.* "If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—*regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.*" *Id.* at 252-53 n.19 (emphasis added).

C. The Decisions Of The Other Circuits

No court of appeals aside from the Second Circuit has employed the Second Circuit's subjective motives-based approach to determining the deference owed to the plaintiff's choice of forum. Instead, employing modes of analysis that differ in only minor respects, those courts give either full deference, as in *Gilbert*, or limited deference, as in *Koster* and *Piper*, depending on the residence of the plaintiff and whether or not the plaintiff is suing in a representative capacity. Thus, these courts employ an objective status-based approach in determining the degree of deference due, as opposed to the Second Circuit's subjective motives-based sliding-scale inquiry. If the plaintiff is a forum resident suing in an individual capacity, then full deference applies, such that the plaintiff's choice of forum will stand "unless the balance [of public and private factors] is strongly in favor" of the alternative forum. *See Gilbert*, 330 U.S. at 508. If the plaintiff is not a forum resident, or if the plaintiff sues in a representative capacity, then limited deference applies, and the burden placed upon a defendant moving for dismissal on grounds of *forum non conveniens* is correspondingly lessened. None of these courts considers the public and private interest factors at the initial stage of determining the level of deference to be afforded the plaintiff's choice of forum. To the contrary, those public and private interest factors enter the calculus only after the degree of deference has been determined.

The Fifth Circuit's decision in *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000), is typical of the approach that courts outside the Second Circuit use to determine deference to plaintiff's forum choice. In assessing the *forum non conveniens* issue, the court held that because the plaintiffs were not residents of the forum, "their initial choice of forum merits less deference than courts typically give to such decisions." *Id.* at 222 (citing *Piper*, 454 U.S. at 255). In light of this limited weight given to the plaintiff's forum choice, "where the [district] court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Id.* (quoting *Piper*, 454 U.S. at 257). The court then proceeded to address the public and private interest factors, concluding that the district court was within its discretion to dismiss on the basis of *forum non conveniens*. *Id.*

The decision of the Eleventh Circuit in *Leon v. Millon Air, Inc.*, 251 F.3d 1305 (11th Cir. 2001), likewise illustrates this status-based approach to deference. In assessing the degree of deference due to plaintiff's forum choice, the court noted that "there is normally a strong presumption that the plaintiff has chosen a sufficiently convenient forum," but that "the presumption that a plaintiff has chosen a sufficiently convenient forum 'weakens' when the plaintiff is a foreigner litigating far from home, and in such cases plaintiff's forum choice is accorded 'less deference.'" *Id.* at 1314-15 (citations omitted). The court then addressed the public and private interest factors, affirming the dismissal because those factors "weigh in favor of" the alternative forum. *Id.* at 1315.

The decisions of the other circuits are in accord, applying either full or limited deference based on the status of the plaintiff, with the public and private interest factors considered as a separate step in the analysis after the level of deference has been determined. *See, e.g., Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 719-21 (1st Cir. 1996) (public and

private interest factors must "strongly favor litigating the claim in the alternative forum" because "plaintiffs brought suit in their home forum"); *Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1029-33 (3d Cir. 1980); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 105-07 (6th Cir. 1989); *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802-05 (7th Cir. 1997); *EFCO Corp. v. Aluma Sys. of USA, Inc.*, 268 F.3d 601, 603 (8th Cir. 2001); *Leetsch v. Freedman*, 260 F.3d 1100, 1102-05 (9th Cir. 2001); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605-10 (10th Cir. 1998); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 606-10 (D.C. Cir. 1983).

D. This Court's Guidance Is Needed To Settle This Important Issue Of Federal Law

In contrast to *Gilbert*, *Piper*, and the law of ten other circuits, the Second Circuit's motives-based approach double-counts the public and private interest factors—first in assessing the parties' motives to establish the degree of deference owed to plaintiff's forum choice, then in reviewing the same private and public interest factors for a second time, now through the prism of that deference (or lack thereof). This double counting predictably exaggerates, or even makes determinative, the impact of double-counted factors. Thus, in this case, the Second Circuit's exaggerated view of the importance of having U.S. courts apply U.S. law played a critical role at both the motive-determining and public interest evaluation stages of the inquiry. Plainly, the clear approach outlined by this Court and followed by the vast majority of the circuits is preferable to the flawed and redundant analysis mandated by the Second Circuit.

The Second Circuit's approach will determine the outcome of the *forum non conveniens* inquiry in a significant number of cases and will almost inevitably anchor transnational class actions in United States courts. The court below concluded, for example, that respondents' decision to file

their complaint in the Southern District of New York was motivated by proper considerations *because* the JPML transferred the various cases to that district. App., *infra*, 10a. That reasoning virtually assures that plaintiffs in multidistrict cases will be deemed to have filed in the multidistrict forum with "good" motives worthy of substantial deference, regardless of the convenience factors described in *Gilbert*, *Koster*, and *Piper*.[10] By the same token, the court below expressly discounted the weight to be given to the Ontario forum based on its impression that petitioners had engaged in forum shopping.[11] App., *infra*, 11a. This motives analysis is directly contrary to *Piper*. 454 U.S. 252 n.19.

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[10] *Cf. Howe*, 946 F.2d at 950 ("To insist that American courts hear cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy.").

[11] The court's treatment of petitioners' motion as "suspect" illustrates how speculative and imprecise the search for motives can be. For one thing, only some petitioners sought consolidation of the various cases in New York for pre-trial purposes pursuant to 28 U.S.C. § 1407. Petitioner Deloitte, for example, did not, yet still had its *forum non conveniens* motion treated as "suspect." In any event, a motion under 28 U.S.C. § 1407 cannot in any respect be seen as a concession that New York would be an appropriate forum for trial. As this Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), makes clear, cases that are consolidated under the auspices of the JPML for purposes of more efficient pre-trial proceedings must nevertheless be returned to their initial fora once pre-trial matters are concluded and the cases are ready for trial. *Id.* at 40. The fact that some of the petitioners may have preferred to have the cases consolidated for pre-trial purposes so that they could file one set of *forum non conveniens* motions in a single court, rather than more than twenty different motions in multiple courts, suggests efficiency and a desire to minimize the burden on the federal courts, not improper gamesmanship. Indeed, because the JPML is not authorized to hear motions to dismiss, *see* 28 U.S.C. § 1407; 17

The practical impact of motives-based analysis is already being felt in the district courts. In *In re CINAR Corporation Securities Litigation*, 186 F. Supp. 2d 279 (E.D.N.Y. 2002), for example, the court, applying *Iragorri* and *DiRienzo I*, gave a high degree of deference to widely-dispersed class plaintiffs' choice of forum in denying defendants' *forum non* motion to dismiss in favor of Canada. Acknowledging that "plaintiffs in this case come from New York, North Carolina, Ohio, and other locations," *id.* at 297, the court found that "this fact does not by itself indicate that they have come before this court harboring an impermissible tactical motive of the sort frowned upon by the *Iragorri* court." *Id.* at 296-97. *DiRienzo I*, the court concluded, "specifically refutes the position that plaintiffs' choice of forum in class action suits in-

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James Wm. Moore et al., Moore's Federal Practice ¶ 112.02(1)(d) (3d ed. 1997), petitioners could not have brought a consolidated motion to dismiss on *forum non conveniens* grounds unless they or some other party first moved (or the JPML acted on its own initiative) to consolidate the separate actions. The moving petitioners' contention that New York was preferable to New Jersey or Pennsylvania is not inconsistent with their contention that Ontario was more convenient than New York, particularly where the moving petitioners made clear to the JPML that Ontario had the greatest connection to the litigation. PSC Parties' Br. in Supp. of Transfer, at 12, *supra* page 4. Finally, the Second Circuit's inappropriate use of the moving petitioners' § 1407 motion as a significant factor weighing against the *forum non conveniens* motion will predictably chill class action defendants in presenting similar motions to the JPML and thereby undermine the proper administration of 28 U.S.C. § 1407.

At the same time, in taking a positive view of respondents' motives, the Court of Appeals failed even to mention respondents' admitted pursuit of substantive advantages in a U.S. forum, see *DiRienzo I* and *supra* note 1. Nor did the court take note of respondents' heavy-handed offer in their Second Circuit brief to abandon non-U.S. class members for the first time on appeal, in a belated effort to tailor the putative transnational class to *Piper*. Pls.' Br. 57; *see* Deloitte Br. 12-14 ("Because the multinational composition of the putative class proves inconvenient for [respondents'] present purposes, [respondents] now 'agree' to limit the class to U.S. purchasers, thus abandoning the foreign members of the putative class.").

volving questions of federal law is entitled to less deference merely because the class could claim many potential 'home fora' given the number of plaintiffs involved." *Id.* at 297.

In the end, after paying lip service to the proper *forum non conveniens* concerns of practical litigation convenience, the reworked majority opinion embraces a framework that attaches overwhelming and disproportionate importance to a single factor—namely the public interest in seeing U.S. courts adjudicate controversies arising at least in part under U.S. law.[12] This framework will defeat well-grounded *forum non conveniens* motions—as it does in the majority opinion—in a wide variety of securities and non-securities cases, including those filed as class actions: environmental cases, product liability cases,[13] antitrust cases, and financial institution cases, to name but a few likely categories. At the same time as the majority attaches *de facto* dispositive significance to plaintiffs' preference for a U.S. forum, the majority attaches no apparent significance to the representative capacity of the plaintiffs in a class action. On a practical level, then, *DiRienzo II* inflicts a double blow on the law of *forum non*

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[12] Not only does the Second Circuit's approach fail to give proper consideration to the multiple factors enumerated by this Court in *Gilbert*, but—by ignoring Canada's interest in seeing Canadian courts adjudicate controversies arising in part under Canadian law—also fails to extend the respect to foreign countries and foreign courts that comity demands.

[13] See, for example, the Toyota product liability action cited by the panel majority as a paradigm of a case that should be litigated in the United States. App., *infra*, 16a. Petitioners' point is not that this hypothetical case should *not* be litigated in the United States, but that (as the *DiRienzo II* majority consistently fails to recognize) whether the Toyota example or any other case should be litigated here or elsewhere should be a function of practical convenience and not necessarily determined by the substantive interest of the United States in redressing harm done to its citizens. That interest is only one of the public interest factors to be considered—once—in the discretion of the district court. *See Gilbert*, 330 U.S. at 509.

conveniens and thereby erects a nearly insurmountable barrier to such motions in transnational class actions that include claims of U.S. citizens under U.S. laws. *DiRienzo II* is a decision of broad applicability and exceptional importance that warrants review, and ultimately reversal, by this Court.

II. Review Is Warranted To Resolve The Conflict Over The Deference Owed To A Class Action Plaintiff's Choice Of Forum

A. The Second Circuit's Approach

The court below declined to follow this Court's holding in *Koster*, opting instead to follow its own holding in *Iragorri*. App., *infra*, 9a. Despite respondents' status as class representatives, the court below afforded respondents' choice of forum full, undiminished deference under *Gilbert*. *Id.*

B. This Court's *Koster* Decision

In *Koster*, a policyholder living in New York brought a derivative action in New York on behalf of the nominal defendant insurance company, which was an Illinois entity, against an individual Illinois resident and an Illinois corporation, seeking an accounting for the damages the insurance company sustained. The trial court granted the defendants' motion to dismiss on the basis of *forum non conveniens*, and the court of appeals affirmed. The lower courts agreed that trial would be more appropriate in Illinois than in New York. 330 U.S. at 519-21.

This Court began its analysis by noting that "[w]here there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice." *Id.* at 524. "He should not be deprived of the presumed advantages of his home jurisdiction," except where the facts either "establish such oppressiveness and vexation to a defendant as to be out of all proportion to plain-

tiff's inconvenience, which may be shown to be slight or nonexistent," or "make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.* "But where there are hundreds of potential plaintiffs," the Court continued, "all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Id.* The Court recognized that a plaintiff in a derivative action "may have a substantial interest of his own to protect," although "he may also be a mere phantom plaintiff with interest enough to enable him to institute the action and little more." *Id.* at 525.

The Court set forth two main reasons why a plaintiff's choice of forum in a derivative action is entitled to less deference. First, "[t]o entertain such an action places the forum in a position of responsibility toward the whole class which the plaintiff assumes to represent." *Id.* "To prevent collusive settlements and abuses, the Court must approve dismissal or compromise and often must give notice to the other potential plaintiffs," the Court observed. *Id.* A derivative action also thrusts upon a court "the troublesome business of fixing allowances to counsel and accountants for the plaintiff payable out of the . . . recovery." *Id.* "Thus, such a litigation brings to the court more than an ordinary task of adjudication; it brings a task of administration; and what forum is appropriate for such a task may require consideration of its relation to the whole group of members and stockholders whom plaintiff volunteers to represent . . . ." *Id.* at 525-26.

Second, the Court pointed out that although in some cases "[i]t might well be that the books, records and witnesses to establish all or a part of the cause of action are in or near the chosen forum," in other situations "they may all be in some distant jurisdiction, perhaps that of the defendants." *Id.* at 526. "In the ordinary suit it is plaintiff's own books

and records and transactions that are important," whereas "in the derivative action it is more likely that only the corporation's books, records and transactions will be important and only the defendant will be affected by the choice of the place of production of records." *Id.*

In light of the "considerably weakened" deference to which the representative plaintiff's choice of forum was entitled, as well as the broad discretion conferred upon the district court to weigh the factors favoring one forum over another, the Court affirmed the dismissal. *Id.* at 524, 531-32.

C. This Court's Guidance Is Needed To Settle This Important Issue Of Federal Law

In its revamped opinion, the Second Circuit majority cosmetically retreated from its explicit refusal in *DiRienzo I* to apply *Koster* in the class action context. Nevertheless, the court's critical determination in *DiRienzo II* that a class action plaintiff's choice of forum is entitled to full deference remains flatly irreconcilable with *Koster*. Class actions such as this case raise precisely the same concerns that gave rise to the holding in *Koster* that representative plaintiffs in policyholder or shareholder derivative actions are not entitled to the customary deference regarding choice of forum.

Class action plaintiffs, just like plaintiffs in derivative actions, sue in a representative capacity. They occupy a fiduciary relationship with respect to the class members, *see, e.g.*, *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000), as do the shareholders suing on behalf of the corporation for the benefit of the other shareholders. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949). Thus, class actions involve far more than the interests of the named plaintiffs, just as in derivative actions.

Courts must likewise administer class actions to at least the same degree as they administer derivative actions. Class

actions may not be compromised or dismissed without the court's approval, and due process requires that notice be given to class members before they can be bound by most class action judgments. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The court must monitor the case closely to ensure that the named plaintiffs and class counsel do not place their interests above those of the absent class members, *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1112 (10th Cir. 2001), and the court must approve the fee arrangement of class counsel to the extent the fee involves any portion of the amount recovered on behalf of the class. *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 849 (5th Cir. 1998).

Moreover, as in derivative cases, the individual circumstances of the named class action plaintiff are by definition not critical to a determination of the merits of the case. Indeed, if the case depended on proof peculiar to the named representative, the case would be inappropriate for class treatment. *See* Fed. R. Civ. P. 23(a)(3); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 (11th Cir. 2000), *cert. denied*, 532 U.S. 919 (2001). Thus, just as with derivative actions, class actions generally involve documents and witnesses centered around the defendant. Indeed, this is especially true in securities class actions such as this case, where respondents seek to rely on a fraud on the market theory that does not depend on proof of reliance by individual shareholders.

The Second Circuit's refusal to afford diminished deference to the forum chosen by class action plaintiffs both directly conflicts with this Court's decision in *Koster* and has an immense practical effect on the determination of the proper forum for transnational class action litigation. This Court has not addressed the application of *Koster* to class actions despite the fact that the lower courts are divided on the issue and despite the fact that class actions have become

significantly more important in the 55 years since *Koster* was decided. Some courts, applying the *Koster* rule, have accorded only limited deference to a class plaintiff's choice of forum.[14] Other courts have declined, at least under certain circumstances, to extend the *Koster* rule to class actions.[15] This Court should grant certiorari to resolve this issue and to hold unambiguously that *Koster* applies not merely to derivative litigation but to class actions as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[14] *See, e.g., Barnett v. Alabama*, 171 F. Supp. 2d 1292 (S.D. Ala. 2001); *Hoefer v. U.S. Dep't of Commerce*, No. C 00 0918 VRW, 2000 WL 890862 (N.D. Cal. June 28, 2000); *Job Haines Home for the Aged v. Young*, 936 F. Supp. 223 (D.N.J. 1996); *Rosen v. Fidelity Fixed Income Trust*, Civ. A. No. 95-2365, 1995 WL 560037 (E.D. Pa. Sept. 20, 1995); *Guenther v. Cooper Life Scis., Inc.*, Civ. No. 4-88-503, 1988 WL 131340 (D. Minn. Dec. 5, 1988); *Blake Constr. Co. v. International Harvester Co.*, 521 F. Supp. 1268 (N.D. Ill. 1981). Some of the cases cited in this and the following footnote are *forum non conveniens* cases involving foreign fora; others are domestic transfer cases decided under 28 U.S.C. § 1404(a) citing *Koster*.

[15] *See, e.g., In re Lernout & Hauspie Sec. Litig.*, 208 F. Supp. 2d 74 (D. Mass. 2002) (relying on *DiRienzo II*); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279 (E.D.N.Y. 2002) (relying on *DiRienzo I*); *Ayling v. Travelers Prop. Cas. Corp.*, No. 99-3243, 1999 WL 994403 (E.D. Pa. Oct. 28, 1999); *Carson v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, Civ. No. 97-5147, 1998 U.S. Dist. LEXIS 6903 (W.D. Ark. Mar. 30, 1998); *Derensis v. Coopers & Lybrand*, 930 F. Supp. 1003 (D.N.J. 1996); *UAW v. ALCOA*, 875 F. Supp. 430 (N.D. Ohio 1995); *Beres v. Thomson McKinnon Sec., Inc.*, No. 85 Civ. 6684 (SWK), 1987 WL 16977 (S.D.N.Y. Sept. 10, 1987); *Carty v. Health-Chem Corp.*, 567 F. Supp. 1 (E.D. Pa. 1982); *Brody v. American Med. Ass'n*, 337 F. Supp. 611 (S.D.N.Y. 1971).

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September 10, 2002

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

August Term 1999

(Argued: November 22, 2000) (Decided: April 1, 2002)

Docket No. 99-7825

Gabriel DiRienzo; Alan Bilgore; Paul Blanchard; Robert Gans, IRA; Robert Gans; A. Carl Helwig; Barry Zemel; Gregory N. Mappus; Herb Sudzin; Vincent DiTrano; Bruce E. Toll, IRA; Bruce E. Toll; Jane Lanzo; Internet Capital Inc.; Deborah Mieczkowski; Joseph H. Misiewicz; Colin Low; Hazel M. O'Brien; Douglas Schmidt; Charles K. Fasold; Richard Greve; Grace Shum; Ronald Glotzer; Richard Hershey; Ronald McElroy; Charles Miller; Deborah S. Greve; Robert W. Hillger; Carol F. Brink Revocable Trust; William R. Brink, IRA; William R. Brink Revocable Trust; Walter Chompski; Bradwal Investments Ltd.; Local 138, 138A & 138B International Union Of Operating Engineers Fringe Benefit Funds; Melvyn B. Fliegal; James Collins; Albert Solkov; Michael And Sophia Isaacs; Lee Pitman; Kenneth Hare; Thomas Leth; Levi Sabol; and Lawrence M. Siegel; on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Philip Services Corporation; Allen Fracassi; Philip Fracassi; Marvin Boughton; Robert Waxman; John Woodcraft; Colin H. Soule; Norman Foster; Felix Pardo; Howard L. Beck; Ray

Cairns; William E. Haynes; Robert L. Knauss; Derrick Rolfe; Herman Turkstra; Salomon Brothers, Inc.; Merrill Lynch, Pierce Fenner & Smith Incorporated; BT Alex. Brown Incorporated; Morgan Stanley & Co., Incorporated; CIBC Oppenheimer Corp.; Credit Suisse First Boston Corporation; Donaldson, Lufkin & Jenrette Securities Corporation; Lehman Brothers Inc.; Schroder & Co., Inc.; Smith Barney Inc.; Furman Selz LLC; Arnhold and S. Bleichroeder, Inc.; Blackford Securities Corp.; First Albany Corporation; McDonald & Company Securities, Inc.; Janney Montgomery Scott Inc.; WM Smith Securities, Incorporated; Deloitte & Touche, Chartered Accountants,

Defendants-Appellees.

Before CARDAMONE, CABRANES, Circuit Judges, and TRAGER,* District Judge.

Judge CABRANES concurs in part and dissents in part in a separate opinion.

PETITION FOR REHEARING

CARDAMONE, Circuit Judge.

Philip Services Corporation (Philip), a Canadian metal processing company, is alleged to have perpetrated a massive fraud upon its shareholders, the vast majority of whom are United States investors. After Philip stock prices plummeted and extensive securities fraud litigation was commenced in different states and in Canada, the Judicial Panel on Multi-District Litigation transferred all of the American suits—at Philip's request and over the objections of several plaintiffs—to the United States District Court for the Southern District of New York (Mukasey, J.). There they were dis-

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* Hon. David G. Trager, United States District Court Judge for the Eastern District of New York, sitting by designation.

missed, prompting two appeals that were argued together before us in March 2000.

The plaintiffs in *DiRienzo*, the first appeal, sued as representatives of an as-yet uncertified class of Philip investors who bought stock during the proposed class period. Most Philip shares traded during that period were sold in the United States. The *DiRienzo* defendants include Philip directors and officers, Philip's accountants Deloitte & Touche, LLP (Deloitte), a member of Deloitte Touche Tohmatsu, a federation of affiliated accountants headquartered in New York City, and the American underwriters of the 1997 public offering. The *Liff* plaintiffs in the second appeal sold their interests in five American corporations for Philip stock and cash, and sued certain Philip directors and officers for alleged fraud in connection with the sales.

Both cases were dismissed under the doctrine of *forum non conveniens*. *Hillger v. Philip Servs. Corp.* (*In re Philip Servs. Corp. Sec. Litig.*), 49 F. Supp. 2d 629 (S.D.N.Y.1999). We reversed the district court in a split decision entered November 8, 2000. *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49 (2d Cir. 2000) (Cabranes, J., dissenting). Following that decision, the *DiRienzo* and *Liff* defendants petitioned for a rehearing. We denied the petition in *Liff* on February 6, 2001.

While the petition in *DiRienzo* was pending, this Court issued an *en banc* opinion in *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001). *Iragorri* addressed a question common to that case and *DiRienzo*—*as* well as *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000), and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000)—namely, "what degree of deference should the district court accord to a United States plaintiffs choice of a United States forum where that forum is different from the one in which the plaintiff resides." 274 F.3d at 69. Finding the answer in *Iragorri* dispositive of the appeal in *DiRienzo*, we now grant the petition for rehearing in *DiRi-*

enzo, vacate so much of our prior opinion as pertains to the *DiRienzo* action, and issue this decision reversing the judgment of the district court.

BACKGROUND

Philip has its principal offices in Hamilton, Ontario, Canada, with subsidiaries in the United States. Philip decided to become a dominant player in the metal recovery and processing industry in the United States. From 1992-1997 it purchased 15 American companies and maintained facilities in 12 states. These efforts thereafter generated 70 percent of its corporate revenue. To raise money to carry out its corporate plans it sold stock in the United States and Canada.

Philip stock was traded on the New York Stock Exchange, the Toronto Stock Exchange, the Montreal Stock Exchange, and NASDAQ until April 30, 1996. In November 1997 it placed two secondary stock offerings that raised $380 million, of which $284 million came from United States investors and $94 million came from Canadian investors.[1] To tout its 1997 stock offerings Philip aggressively promoted the stock, traveling to United States cities with "road shows," issuing press releases, and filing financial reports with the Securities and Exchange Commission (SEC). Nearly 80 percent of the shares traded in Philip's stock during the class period traded on United States exchanges.

After reporting substantial increases in earnings for the years 1995-1997, the company announced on January 26, 1998 that it would take "charges to earnings" for the 1997 fiscal year of between $250 and $275 million. The company attributed 60 percent of the charges to a restructuring and acquisition program and to an overvaluation of goodwill.

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[1] Unless otherwise noted, all figures stated are in United States dollars. The Treasury Department advises that the exchange rate for March quarter 1998 was Cdn. $1.00 = United States $0.7048.

Two months later Philip announced that the 1997 charges to earnings were actually $310 million, based in part on a $125 million overstatement of inventory. Additional company disclosures made in the following weeks included a further charge to 1997 income of $35 million arising from the improper recording of a copper-related transaction. Total charges against 1997 income equaled $381.2 million.

As a result, top officers resigned or were demoted. In addition, Philip has since restated its 1995 and 1996 financial statements to reduce 1995 earnings by $22.5 million and 1996 earnings by $48.4 million. Thus, instead of posting a $28.4 million profit in 1996 as initially reported, it reported a $20 million loss. Philip's share price plummeted from 13^{1/8}$ on January 26, 1998 to 2^{9/16}$ in July 1998, after which it traded below $2 per share.

The *DiRienzo* complaint alleges four wrongful schemes. First, the "metals recovery division fraud" entailed a variety of alleged accounting irregularities in the Hamilton, Ontario-based Metals Recovery Group, then headed by Robert Waxman. The alleged irregularities included failure to record transactions, overstatement of inventories, and improper deferral of losses. According to the complaint, the accounting discrepancies were resolved by Philip's taking a Canadian $192.67 million (United States $134 million) charge to income, ascribed by the company to copper trading losses in January 1998, when in fact the losses were primarily due to an overstatement of inventory.

Second, the "industrial services group fraud" involved two alleged misrepresentations associated with the 1996 acquisition of the Petrochem S.C. facility in South Carolina. Philip is claimed to have improperly capitalized $8 million in 1996 losses rather than taking them as current expenses. The company also allegedly assumed $15 million in environmental remediation liability when acquiring the facility, but failed to record it.

Third, the "fraudulent 1997 third quarter results," announced November 5, 1997, allegedly included some $24.2 million in fictitious earnings meant to bolster Philip's sale price for the November 1997 offering that closed on November 12, 1997. Fourth, "Waxman's fraud," for which Philip filed suit against Waxman in Ontario, centered around Waxman's alleged orchestration of transactions that diverted Philip's assets to himself and others between 1995 and 1997, resulting in a $90 million overstatement of the Metals Recovery Group's financial position.

During this period, Philip also engaged in various transactions involving its own stock. Between the fall of 1996 and the fall of 1997, it acquired 18 companies—15 of which were American—in stock-for-stock deals. On July 30, 1997 it acquired Serv-Tech, Inc. in exchange for 2.7 million shares of Philip common stock. On July 31, 1997 it acquired Allwaste, Inc., in exchange for 23 million shares of Philip common stock. In October 1997 Philip acquired five American corporations for a combination of cash and Philip stock in the transactions underlying the *Liff* suit.

The proposed class period in *DiRienzo* would extend from February 28, 1996 through and including May 7, 1998. The class would include all purchasers of common stock and call options during that period. The complaint also proposes three subclasses: (a) all purchasers of Philip common stock issued in its November, 1997 public offering pursuant to Philip's November 6, 1997 SEC registration statement; (b) those whose shares of Allwaste, Inc. were exchanged for Philip common stock pursuant to a June 24, 1997 registration statement; and (c) those whose shares of Serv-Tech, Inc. were exchanged for Philip common stock pursuant to a June 24, 1997 registration statement.

The 14 director-officer defendants include ten Canadians resident in Ontario. The other four are Americans, one of whom, Robert L. Knauss, has been Philip's chairman of the board since May 1998. Another defendant, Norman Fos-

ter, served briefly as president of Philip's By-Products Recovery Group. The director and officer defendants generally signed the allegedly false and misleading statements that were part of the public stock offering. They do not all appear in every count in the complaint, but the various claims arise under § 11 (false registration statements), § 12(a)(2) (false prospectuses or oral communications), and § 15 (liability of controlling persons) of the Securities Act, 15 U.S.C. §§ 77k, 77l(a)(2), 77o; §§ 10(b) (manipulative and deceptive devices) and 20(a) (liability of controlling persons and those who aid and abet violations) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78t; and Rule 10b-5, 17 C.F.R. § 240.10b-5 (manipulative and deceptive devices).

Defendant Deloitte is a Hamilton, Ontario partnership comprised solely of Canadian partners. As Philip's outside auditor, Deloitte allegedly rendered unqualified opinions on Philip's 1995, 1996, and 1997 financial statements as well as the financial statements underlying the November 1997 public offering, Allwaste, and Serv-Tech registration statements. The causes of action against Deloitte are also based in federal securities law, specifically Securities Act § 11, Securities Exchange Act § 10(b), and Rule 10b-5. The complaint alleges that Deloitte and the director-officer defendants are liable as direct participants, as participants in a common scheme to defraud, and as co-conspirators in the alleged wrong.

The underwriter defendants are American brokerage and investment banking firms that underwrote the November 1997 American offering. They received commissions for buying large blocks of stock from Philip and then selling the shares to the plaintiffs. The *DiRienzo* complaint seeks either rescission or damages from the defendants under Securities Act § 12(a)(2). Canadian firms that underwrote the Canadian offering are not defendants in this litigation.

On June 25, 1999 Philip filed for bankruptcy in both Ontario and, through a subsidiary, in Delaware. Accord-

ingly, all actions against it have been automatically stayed. Philip's current directors and officers therefore are third-party witnesses. Philip has also been sued in *Menegon v. Philip Services Corp.*, No. 4166-CP/98 (Ont. Ct. (Gen. Div.) filed May 5, 1998), a Canadian class action brought in Ontario Superior Court on behalf of Canadian residents who purchased Philip shares between February 28, 1996 and April 23, 1998. The *Menegon* defendants include Deloitte and the Canadian underwriters of the November 1997 public offering.

With that recitation of the background and prior proceedings in this case, we turn to a discussion of the law.

DISCUSSION

In dismissing a case on the ground of *forum non conveniens*, a district court enjoys wide discretion to which substantial deference is given. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). Such dismissal is reviewed for an abuse of discretion. *Alfadda v. Fenn*, 159 F.3d 41, 45 (2d Cir. 1998). A district court abuses its discretion when "(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon NY, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). In the context of *forum non conveniens*, we may also reverse when a district court fails to consider all the relevant factors or unreasonably balances those factors. *See Piper Aircraft*, 454 U.S. at 257.

I. Deference Owed Plaintiffs' Choice of Forum

We held in *Iragorri* that the "first level of inquiry" in a *forum non conveniens* analysis is to determine what deference is owed a plaintiff's choice of forum. 274 F.3d at 73. Ordinarily a strong favorable presumption is applied to that choice. *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996). "[U]nless the balance is strongly in favor of the

defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). In *Iragorri* we ruled that a court should begin with the assumption that a plaintiff's choice of forum will stand unless the defendant can demonstrate that reasons exist to afford it less deference. 274 F.3d at 70-71.

The district court in the case at hand, relying on *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), gave less weight to the plaintiffs' choice of forum because they sued in a representative capacity. *In re Philip Servs.*, 49 F. Supp. 2d at 634. In our prior decision the majority disagreed with the district court's interpretation of *Koster*, *see* 232 F.3d at 60-62, but we now vacate that portion of the opinion.[2] For even were the district court correct, *Iragorri* posits that defendants' motion to dismiss should also be viewed with greater skepticism.

Affording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum. The trial court, however, after interpreting *Koster*, appears to have made only passing reference to the weight entitled plaintiffs' choice. *See In re Philip Servs.*, 49 F. Supp. 2d at 639-43 (mentioning only once, at the outset of the analysis, that proper deference is owed plaintiffs' choice of forum). To determine what amount of deference should have been given, *Iragorri* instructs that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." 274 F.3d at 71-72.

Although less than all of the named plaintiffs in *DiRienzo* reside in the Southern District of New York, no evi-

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[2] Vacating this discussion of *Koster* does not impact our resolution of *Liff* because that case involved a direct action. *See DiRienzo*, 232 F.3d at 60.

dence suggests they had an improper motive in bringing suit there. In fact, plaintiffs offered a quite valid reason for litigating in federal court: this country's interest in having United States courts enforce United States securities laws. *See Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993). We recognize that this interest is not outcome-determinative in the weighing of relevant factors, *see Alfadda*, 159 F.3d at 47, but it nonetheless demonstrates a "bona fide" connection to the United States, that is, a valid reason. *See Iragorri*, 274 F.3d at 72. Further, considering that defendants sought out business opportunities in this country by registering stock on American exchanges, filing statements with the SEC and conducting the bulk of its business in the United States—as well as the claim that most plaintiffs conducted their stock transactions within the United States—a legitimate interest exists in trying this securities fraud litigation here. The SEC reiterated that point in a *post-Iragorri amicus* letter to the Court.

With respect to the complaint being filed in the Southern District of New York, plaintiffs have another reason that the law recognizes as valid: the transfer order of the Judicial Panel on Multidistrict Litigation placed their cases there. Although the consolidated and amended class action complaint was filed after the transfer order—and the transfer order, standing alone, is not dispositive or outcome-determinative—nothing in the record suggests the filing was motivated by anything other than this order. Plaintiffs had already demonstrated their preference to pursue litigation in other districts by filing complaints in the District of New Jersey and the Western District of Pennsylvania.

In fact, plaintiffs' decision to pursue consolidated litigation in the Southern District of New York seems to stem from the granting of *defendants'* motion by the Judicial Panel to transfer the separate cases to this particular district. *Iragorri* teaches that we should focus on this circumstance. *See* 274 F.3d at 73 ("[T]he court must consider a plaintiff's

likely motivations [for having filed suit in a particular federal district court] in light of all the relevant considerations."). All the parties who responded to defendants' motion agreed as to the propriety of centralizing the litigation, though some of the Pennsylvania plaintiffs preferred consolidating the case in the Western District of Pennsylvania. The Judicial Panel rejected this idea, ruling instead that "[c]entralization . . . in the Southern District of New York will serve *the convenience of the parties and witnesses* and promote the *just and efficient* conduct of the litigation." *In re Philip Servs. Corp. Sec. Litig.*, No. 1230 (J.P.M.L. June 2, 1998) (emphases added).

Thus, defendants' current claims of inconvenience raise questions as to their underlying motives. The way in which they have used procedural tactics ultimately to obtain dismissal of plaintiffs' suit in district court in favor of Canada counsels caution in evaluating their *forum non conveniens* motion. *See Iragorri*, 274 F.3d at 75 ("Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of forum-shopping reasons.").

II. Assessing Conveniences

A *forum non conveniens* motion cannot be granted absent an adequate alternative forum. *See id.* at 73; *see also Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). We previously found Ontario an adequate forum to try the instant case. *DiRienzo*, 232 F.3d at 57-60; *id.* at 68 (Cabranes, J., dissenting) (agreeing that Canada is an adequate alternative forum). Since that part of our opinion will not be vacated, we need not repeat the analysis here, but rather incorporate it by reference.

The next step in assessing convenience is to balance the public and private interest factors articulated in *Gilbert*. The portion of the original majority opinion weighing the *Gilbert*

factors, *DiRienzo*, 232 F.3d at 63-67, is now vacated. The burden of demonstrating that the plaintiff's chosen forum is not convenient is on the defendant seeking dismissal. *Wiwa*, 226 F.3d at 100. Because much of the doctrine's strength derives from its flexibility and each case turns on its own facts, a single factor is rarely dispositive. *See Piper Aircraft*, 454 U.S. at 249-50.

A. Private Interest Factors

The private interest factors enumerated in *Gilbert* include: (1) ease of access to evidence; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of willing witnesses' attendance; (4) if relevant, the possibility of a view of premises; and (5) all other factors that might make the trial quicker or less expensive. 330 U.S. at 508; *Iragorri*, 274 F.3d at 73-74. Only the first three factors are implicated here.

We see no error in the district court's finding that the bulk of relevant documents is in Ontario, at either Philip's or Deloitte's Hamilton facilities. *In re Philip Servs.*, 49 F. Supp. 2d at 641. We reiterate, however, that plaintiffs should not have been deprived of their choice of forum except upon defendants' clear showing that a trial in the United States would be so oppressive and vexatious to them as to be out of all proportion to plaintiffs' convenience. *See Koster*, 330 U.S. at 524. The defendants have failed to explain how transporting the documents or copies of them would be "oppressive" or "vexatious," nor does the district court offer a satisfactory explanation. *See In re Philip Servs.*, 49 F. Supp. 2d at 641. And, absent an explanation, less weight should be accorded this factor. *Cf. Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996) ("To the extent documents exist in England, advances in transportation and communication accord this issue less weight."). Of greater significance, the district court committed a legal error by failing to hold defendants to their burden of proof.

With respect to the location of witnesses, we agree with the district court's finding that most of the potential witnesses with direct knowledge of the alleged fraud are located in Ontario. *In re Philip Servs.*, 49 F. Supp. 2d at 640. Willing witnesses can easily travel from Toronto to New York by a direct 90 minute flight, and Hamilton is less than an hour's drive from Toronto. Such travel today is not burdensome in terms of cost or time, and defendants have not shown otherwise.

The most important problem is the unavailability of process to compel unwilling third-party witnesses to appear in the United States. Former Philip employees such as Peter McQuillan, the former comptroller of Philip's Scrap Metals Division, reside in Canada and thus cannot be compelled to testify in American courts as they would be in Canadian courts. Live testimony is especially important in a fraud action where the factfinder's evaluation of witnesses' credibility is central to the resolution of the issues. *See Alfadda*, 159 F.3d at 48; *Allstate*, 994 F.2d at 1001; *see also Iragorri*, 274 F.3d at 75.

Despite the preference for live testimony, we have recognized the availability of letters rogatory as relevant in deciding whether plaintiffs' chosen forum is inconvenient. *See, e.g., Overseas Programming Cos., Ltd. v. Cinematographische Commerz-Anstalt*, 684 F.2d 232, 235 (2d Cir. 1982) (noting that "any difficulties . . . regarding witnesses whose attendance the Court is unable to compel can most likely be resolved by the use of deposition testimony or letters rogatory"); *see also In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 211 (S.D.N.Y. 1999). While demeanor evidence is important when trying a fraud case before a jury, *see Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991), videotaped depositions, obtained through letters rogatory, could afford the jury an opportunity to assess the credibility of these Canadian witnesses. Yet considering the number of witnesses for whom these accommodations would

have to be made and the preference for live testimony, the district court did not abuse its discretion when it found this factor weighs in favor of defendants.

Hence, on the evidence presented, we think the balance of the private interest factors is close. *Gilbert* tells us that unless the balance strongly favors defendant, plaintiffs' choice of forum "should rarely be disturbed." 330 U.S. at 508.

B. Public Interest Factors

The Supreme Court has outlined four public interest factors to be weighed in the *forum non conveniens* inquiry: (1) administrative difficulties associated with court congestion; (2) the unfairness of imposing jury duty on a community with no relation to the litigation; (3) the "local interest in having localized controversies decided at home;" and (4) avoiding difficult problems in conflict of laws and the application of foreign law. *Gilbert*, 330 U.S. at 508-09; *see also Iragorri*, 274 F.3d at 74. We discuss them here slightly out of order, as did the district court.

1. *Administrative Difficulties.* The district court did not abuse its discretion in finding the first factor does not strongly favor either party. *See In re Philip Servs.*, 49 F. Supp. 2d at 642. Ontario courts, like the Southern District of New York, suffer from congestion. There may be some administrative advantage in dismissing *DiRienzo* in Ontario's favor because *Menegon*, a similar case involving a class of only Canadian plaintiffs, is already pending there. Although the issues in the two cases will obviously overlap, they also differ somewhat because *DiRienzo* involves American registration statements and the likely application of American law to most claims. In any event, this circumstance is of little weight because the existence of related litigation is not one of the factors enumerated in *Gilbert*. *See Guidi*, 224 F.3d at 148.

2. *Avoiding Conflicts of Law Problems.* The district court correctly noted, *see* 49 F. Supp. 2d at 642, that while an Ontario court would likely apply American law to at least the claims arising under §§ 11 and 12(a) of the Securities Act, an American court would likely apply Canadian law to claims by non-resident class members based on the purchase of securities outside the United States. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 127-29 (2d Cir. 1998); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975). The interest in avoiding the application of foreign law therefore does not favor either forum.

3. *Jury Duty Imposed on Community With no Relation to Controversy.* The district court did not explicitly discuss this factor. But as has been noted and as will be explored in the next section, the Southern District of New York, home to the American stock exchanges through which Philip sold shares, has a local interest in this lawsuit. Where American investors have allegedly suffered harm from purchases made in New York, that community has an interest in considering such claims.

4. *Local Interest.* The district court found the local interest factor "weigh[ed] heavily in favor of litigation in Ontario." *In re Philip Servs.*, 49 F. Supp. 2d at 642. It based its conclusion, for the most part, on the factual finding that "this case predominantly concerns the conduct of a major Canadian corporation in Canada, notwithstanding the involvement of some American entities and persons." *Id.*

This finding is clearly erroneous. It fails to acknowledge as a factual matter that plaintiffs' amended complaint alleges the majority of their securities transactions were conducted entirely in the United States, by Americans, in American dollars, on American stock exchanges. For example, plaintiffs claim that nearly 80 percent of Philip's shares sold during the class period were traded on exchanges in the United States.

As the SEC argues in its *amicus* brief, dismissing this case is no more appropriate than dismissing a products liability case brought in the United States against Toyota simply because the design and manufacture of the automobile took place in Japan. While the complaint alleges a fraud that was largely executed in Ontario, neither the dissemination of the allegedly misleading statements nor the plaintiffs' losses were localized there.

Further, the trial court stated that "[p]arties who choose to engage in international transactions, as plaintiffs did here, 'cannot expect always to bring their foreign opponents into a United States forum.'" *In re Philip Servs.*, 49 F. Supp. 2d at 642. But, the cases cited for this proposition either do not bind us or involve easily distinguishable facts. Hence, the district court's conclusion advances a legal principle inapplicable to the bulk *of DiRienzo* plaintiffs.

In *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 712 (2d Cir. 1987), an American corporation had purchased a majority interest in one Israeli corporation from a second Israeli corporation. The contracts at issue had been negotiated and executed in Israel, and the purchaser had hired an Israeli attorney for the negotiations. *See id.* at 123-25. The district court held that the case should be dismissed in favor of Israel as a forum. *See id.* at 127-30. Similarly, the First Circuit's decision in *Howe* emphasized that the Canadian stock at the center of the alleged securities fraud was traded only on Canadian stock exchanges, and that its sellers had made no effort to market it in the United States except in response to unsolicited inquiries. *See* 946 F.2d at 952-53. Although the final case on which the district court relied involved facts more similar to those before us, the case was actually decided on grounds of international comity and its *forum non conveniens* comment was *dictum*. *See DeYoung v. Beddoine*, 707 F. Supp. 132, 133-34, 138 (S.D.N.Y. 1989).

In contrast to *Diatronics* and *Howe*, *DiRienzo* does not involve Americans who sought out involvement with a foreign forum. It was Philip who came to them by registering its stock on American exchanges, filing statements with the SEC, and conducting the bulk of its business—including multiple corporate acquisitions—in the United States. Plaintiffs are involved in this lawsuit precisely because of aggressive selling techniques by Philip *within* the United States that targeted United States investors as potential purchasers of its stock.

These facts further distinguish *DiRienzo* from those cases where we have affirmed *forum non conveniens* dismissals. *See, e.g.*, *Alfadda*, 159 F.3d at 46-48 (affirming dismissal of Saudi Arabian investors' suit against Netherlands Antilles corporation over conduct of French bank owned by corporation, where all documents and witnesses were in France or Saudi Arabia and documents were in French and no plaintiffs were American); *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1233-34 (2d Cir. 1996) (affirming dismissal where American shareholder sued over the right to a seat on the board of directors of a Scottish corporation, considered to be a decision of internal management); *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 149 (2d Cir. 1980) (en banc) (affirming dismissal of admiralty action brought by American corporation after its charter vessel—owned by Liberian corporation—collided with a pier owned by plaintiff in Trinidad); *Calavo Growers of Cal. v. Belgium*, 632 F.2d 963, 965-66 (2d Cir. 1980) (affirming dismissal of breach of contract and fraud action arising out of fig shipment insurance policies negotiated and purchased by parties' brokers in Belgium and possibly involving questions of insurance industry usage in Belgium and the pre-shipment condition of the figs in Turkey).

Because the *Gilbert* test is so fact-specific, a district court's erroneous understanding of facts central to a case can

preclude a reasonable balancing of the *Gilbert* factors and form the basis for reversal on appeal. *See R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991) (finding abuse of discretion where misidentification of the "fundamental issue in the case" affected entire *forum non conveniens* analysis); *Overseas Programming*, 684 F.2d at 235 (finding error in balancing of *Gilbert* factors where court "failed to identify the basic issue in the lawsuit").

Reversal is further warranted in the circumstances presented here because the district court's ruling falls outside the permissible range of decisions, once the interest of the United States in enforcing its securities laws is factored into the equation. *See Allstate*, 994 F.2d at 1002; *cf. Howe*, 946 F.2d at 953 (explaining that federal securities laws are *not* meant to protect those who purchased their securities *abroad*). A strong public interest favors access to American courts for those who use American securities markets. The fraud on the market theory itself illustrates investors' reliance on accurate and complete information. *See Basic Inc. v. Levinson*, 485 U.S. 224, 245-47 (1988). For securities markets to function efficiently, securities fraud law must be clear and enforceable. As the statute explaining the need for regulation and control of transactions in securities exchanges and over-the-counter markets states, these transactions are "affected with a national public interest." Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78b. Thus, those laws must also be applied consistently with regard to the significant majority of the putative class who bought their securities on American markets.

While Ontario has an analogous interest with respect to Canadians who bought their Philip stock in Ontario, they are a small minority of the proposed class and Ontario's interest is correspondingly less. *Cf. Wiwa*, 226 F.3d at 103 (ruling that the district court applied an incorrect standard of law in its *forum non conveniens* analysis by "fail[ing] to credit the

fact that two of the [four] plaintiffs were United States citizens").

Hence, the public interest factors favor an American forum for the trial of this securities fraud litigation to a greater degree than recognized by the district court. Combined with the relatively even balance among private interest factors as a result of defendants' failure to show "oppressiveness and vexation . . . out of all proportion to plaintiff[s'] convenience," *Koster*, 330 U.S. at 524, and the skepticism which should accompany defendants' *forum non conveniens* motion, we think the district court erred as a matter of law when granting the motion to dismiss this case in favor of it being brought in Canada. An action is to be dismissed "only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Iragorri*, 274 F.3d at 74-75. Consequently, although defendants may have shown Canada to be an appropriate forum, they have not met their burden of proving that litigation in the United States is unnecessarily inconvenient for them to a degree much greater than the convenience that would be afforded plaintiffs by trial in the Southern District of New York. *See Piper Aircraft*, 454 U.S. at 256 n.23; *Koster*, 330 U.S. at 524.

CONCLUSION

Accordingly, the judgment in *DiRienzo* is reversed, and the case remanded to the district court for further proceedings not inconsistent with this opinion.

JOSÉ A. CABRANES, Circuit Judge, concurring in part and dissenting in part.

In *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2000) (*en banc*), a unanimous *en banc* Court principally held that (1) a district court's decision on a motion to dismiss for *forum non conveniens* "lies wholly within the broad discretion of the district court and may be overturned only when that discretion has been *clearly abused*," *id.* at 72 (internal quotation marks and citation omitted); and (2) "re-

view of a motion to dismiss for *forum non conveniens* should begin with the assumption that the plaintiff's choice of forum will stand" but "the degree of deference given to a plaintiff's forum choice varies with the circumstances," *id.* at 71.

The instant case lies at the crossroads of those two standards. Accordingly, while I concur in Part I of the majority's Discussion in its opinion on the motion for panel rehearing (concerning the deference owed plaintiffs' choice of forum, *see ante* at ---- - ----), I am unable to agree with its analysis in Part II, which rebalances the factors enumerated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947), *see ante* at 13-23, that were already weighed by the District Court in a careful and thoughtful opinion, *see In re Philip Servs. Corp. Sec. Litig.*, 49 F. Supp. 2d 629, 639-643 (S.D.N.Y. 1999). I therefore dissent from the panel's disposition of this case. "[S]ubstituting our view of the matter for that of the district court" is impermissible after *Iragorri*, 274 F.3d at 72—which, as an *en banc* opinion of our Court, establishes the authoritative standard for the application of *forum non conveniens* principles in this Circuit. Accordingly, although I believe that the majority's analysis in Part I is correct, I do not agree that the majority has accorded appropriate deference to the District Court's evaluation of the public and private interest factors that, taken together, should be controlling.

I am pleased to join Part I of the majority's Discussion, which addresses the deference to be accorded a plaintiffs choice of forum. *See ante* at ---- - ----. In that portion of the opinion, the majority, as prescribed in *Iragorri*, focuses on the legitimacy of plaintiffs' reasons for choosing the forum, *see* 274 F.3d at 71-72 ("The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice."). *Ante* at ---- - ----. In addition, the majority properly observes that defendants' claims of inconvenience may be anomalous

in light of defendants' earlier motion before the Judicial Panel on Multidistrict Litigation to transfer the separate cases to the Southern District of New York. *Id.* at ----.

Nevertheless, I dissent with respect to Part II of the majority's Discussion, which, in my view, does not give adequate deference to the District Court's decision. *See id.* at ----. In the introduction to its Discussion, the majority sets out the abuse of discretion standard applicable to our review of a district court's decision on a motion to dismiss for *forum non conveniens. Id.* at ----. While this is unquestionably the appropriate standard of review, I disagree with the majority's application of that standard.

In *Iragorri*, we emphasized the considerable deference to be accorded a district court's decision on a motion to dismiss for *forum non conveniens.* 274 F.3d at 72. We stated,

> The decision to dismiss a case on *forum non conveniens* grounds "lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been *clearly abused.*" *Scottish Air Int'l, Inc. v. British Caledonian Group PLC*, 81 F.3d 1224, 1232 (2d Cir. 1996) (emphasis added). In other words, "[o]ur limited review . . . encompasses the right to determine whether the district court reached an erroneous conclusion on either the facts or the law." *Guidi*, 224 F.3d at 145 (internal quotation marks omitted); *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998) ("Our review of a forum non conveniens dismissal is *extremely limited.*" (emphasis added)). Accordingly, *we do not, on appeal, undertake our own de novo review, simply substituting our view of the matter for that of the district court.*

Id. (underlining emphasis added). In light of that strong language stressing the deference owed to a district court's de-

termination under the abuse of discretion standard and our extremely cabined review, I cannot in good faith, after *Iragorri*, support the rebalancing of the *Gilbert* factors in Part II of the majority opinion. Accordingly, I respectfully adhere to the views that I expressed in my original dissent in this case, *see DiRienzo*, 232 F.3d at 68-72 (Cabranes, J., dissenting), concerning the District Court's weighing of the *Gilbert* factors.[1]

With that said, I take comfort in noting that the petition for panel rehearing in this long-lived case has been pending since well before our decision in *Iragorri*, and, of course, it is that recent, unanimous decision of the *en banc* Court that now stands as our Circuit's authoritative statement of the law.

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[1] Since the majority's original opinion on this subject is now vacated, my prior dissent should be read in conjunction with the majority's new opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

August Term 1999

(Argued: March 13, 2000) (Decided: November 8, 2000)

Docket Nos. 99-7776, 99-7825

Gabriel DiRienzo; Alan Bilgore; Paul Blanchard; Robert Gans, IRA; Robert Gans; A. Carl Helwig; Barry Zemel; Gregory N. Mappus; Herb Sudzin; Vincent DiTrano; Bruce E. Toll, IRA; Bruce E. Toll; Jane Lanzo; Internet Capital Inc.; Deborah Mieczkowski; Joseph H. Misiewicz; Colin Low; Hazel M. O'Brien; Douglas Schmidt; Charles K. Fasold; Richard Greve; Grace Shum; Ronald Glotzer; Richard Hershey; Ronald McElroy; Charles Miller; Deborah S. Greve; Robert W. Hillger; Carol F. Brink Revocable Trust; William R. Brink, IRA; William R. Brink Revocable Trust; Walter Chompski; Bradwal Investments Ltd.; Local 138, 138A & 138B International Union Of Operating Engineers Fringe Benefit Funds; Melvyn B. Fliegal; James Collins; Albert Solkov; Michael And Sophia Isaacs; Lee Pitman; Kenneth Hare; Thomas Leth; Levi Sabol; and Lawrence M. Siegel; on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Philip Services Corporation; Allen Fracassi; Philip Fracassi; Marvin Boughton; Robert Waxman; John Woodcraft; Colin H. Soule; Norman Foster; Felix Pardo; Howard L. Beck; Ray

Cairns; William E. Haynes; Robert L. Knauss; Derrick Rolfe; Herman Turkstra; Salomon Brothers, Inc.; Merrill Lynch, Pierce Fenner & Smith Incorporated; BT Alex. Brown Incorporated; Morgan Stanley & Co., Incorporated; CIBC Oppenheimer Corp.; Credit Suisse First Boston Corporation; Donaldson, Lufkin & Jenrette Securities Corporation; Lehman Brothers Inc.; Schroder & Co., Inc.; Smith Barney Inc.; Furman Selz LLC; Arnhold and S. Bleichroeder, Inc.; Blackford Securities Corp.; First Albany Corporation; McDonald & Company Securities, Inc.; Janney Montgomery Scott Inc.; WM Smith Securities, Incorporated; Deloitte & Touche, Chartered Accountants,

Defendants-Appellees.

Before: CARDAMONE, CABRANES, Circuit Judges, and TRAGER,* District Judge.

Judge JOSÉ A. CABRANES dissents in a separate opinion.

CARDAMONE, Circuit Judge:

Philip Services Corporation (Philip), a Canadian metal processing company, is alleged in the complaint in the instant action to have perpetrated a massive fraud upon its shareholders, the vast majority of whom are U.S. investors. Philip decided about eight years ago to become a dominant player in the metal recovery and processing industry in the United States. To that end during the period 1992-97 it purchased 15 American companies and maintained facilities in 12 states. Its American efforts thereafter generated 70 percent of its corporate revenue. To raise money to carry out its corporate plans it sold stock in the U.S. and Canada. In November 1997 it placed two secondary stock offerings that

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* Hon. David G. Trager, United States District Court Judge for the Eastern District of New York, sitting by designation.

raised $380 million, of which $284 million came from U.S. investors and $94 million came from Canadian investors.[1]

By the end of 1996, the number of Philip's shares outstanding, traded on American and Canadian stock exchanges, had increased substantially, and 60 percent of the 70 million shares were held by U.S. investors. To tout its 1997 stock offerings Philip aggressively promoted the stock, traveling to U.S. cities with "road shows," issuing press releases, and filing financial reports with the Securities and Exchange Commission. When extensive litigation was commenced in different states in the U.S. and in Canada, the American suits were all transferred by the Judicial Panel on Multi-District Litigation to the United States District Court for the Southern District of New York, where they were dismissed, prompting the two appeals, argued together, before us now.

These appeals arise out of the allegedly fraudulent misrepresentations regarding the income and value of Philip during a three-year period between 1995 and 1998. In both cases plaintiffs allege federal securities law fraud as well as various state law claims. Philip is now in bankruptcy proceedings in Canada. The plaintiffs in *DiRienzo*, the first appeal, sue as representatives of an as-yet uncertified class of Philip investors who bought stock during the proposed class period. Most Philip shares traded during that period were sold in the United States. The *DiRienzo* defendants include Philip directors and officers, Philip's accountants Deloitte & Touche, LLP, a member of Deloitte Touche Tohmatsu, a federation of affiliated accountants headquartered in New York City, and the American underwriters of the 1997 public offering.

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[1] Unless otherwise noted, all figures stated are in U.S. dollars. The Treasury Department advises that the exchange rate for March quarter 1998 was Cdn. $1.00 = U.S. $0.7048.

The *Liff* plaintiffs, in the second appeal, sold their interests in five American corporations for Philip stock and cash, and sue certain Philip directors and officers for alleged fraud in connection with the sales. Both cases were dismissed by the district court under the doctrine *of forum non conveniens*. *See In re Philip Servs. Corp. Sec. Litig.*, 49 F. Supp. 2d 629 (S.D.N.Y. 1999). Because we think the district court's application of the test established in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), was in some respects fundamentally flawed, we reverse.

BACKGROUND

Philip, the corporation whose securities lie at the core of this case, has its principal offices in Hamilton, Ontario, Canada, with subsidiaries in the United States. During the proposed class period, its primary base of operations was in the United States, where the bulk of its revenues were generated. Its stock was traded on the New York Stock Exchange (NYSE), the Toronto Stock Exchange (TSE), the Montreal Stock Exchange, and NASDAQ until April 30, 1996. Nearly 80 percent of the shares traded in Philip's stock during the class period traded on U.S. exchanges.

After reporting substantial increases in earnings for the years 1995-1997, the company announced on January 26, 1998 that it would take "charges to earnings" for the 1997 fiscal year of between $250 and $275 million. The company attributed 60 percent of the charges to a restructuring and acquisition program and to an overvaluation of goodwill. Two months later Philip announced that the 1997 charges to earnings were actually $310 million, based in part on a $125 million overstatement of inventory. Additional company disclosures made in the following weeks included a further charge to 1997 income of $35 million arising from the improper recording of a copper-related transaction. All these charges against 1997 income totaled $381.2 million.

As a result, top officers resigned or were demoted. In addition, Philip has since restated its 1995 and 1996 financial

statements to reduce 1995 earnings by $22.5 million and 1996 earnings by $48.4 million. Thus, instead of posting a $28.4 million profit in 1996 as initially reported, it reported a $20 million loss. Philip's share price plummeted from $13^{1/8}$ on January 26, 1998 to $2^{9/16}$ in July 1998, and since August 18, 1998 it has traded below $2 per share.

A. *DiRienzo* Suit

The *DiRienzo* complaint alleges four wrongful schemes as bases for its claims. First, the "metals recovery division fraud" entailed a variety of alleged accounting irregularities in the Hamilton, Ontario-based Metals Recovery Group, then headed by Robert Waxman. The alleged irregularities included failure to record transactions, overstatement of inventories, and improper deferral of losses. According to the complaint, the accounting discrepancies were resolved by Philip's taking a Canadian $192.67 million (about U.S. $134 million) charge to income, ascribed by the company to copper trading losses in January 1998, while, in fact, the losses were primarily due to an overstatement of inventory.

Second, the "industrial services group fraud" involved two alleged misrepresentations associated with the 1996 acquisition of the Petrochem S.C. facility in South Carolina. First, Philip allegedly improperly capitalized $8 million in 1996 losses rather than taking the losses as current expenses; second, the company allegedly assumed, but failed to record, $15 million in environmental remediation liability when it acquired the facility.

Third, the "fraudulent 1997 third quarter results," announced November 5, 1997, allegedly included some $24.2 million in fictitious earnings meant to bolster Philip's sale price for the November 1997 offering that closed on November 12, 1997. Fourth, "Waxman's fraud," for which Philip filed suit against Waxman in Ontario, centered around Waxman's alleged orchestration of transactions that diverted Philip's assets to himself and others between 1995 and 1997,

resulting in a $90 million overstatement of the Metals Recovery Group's financial position.

During this period, Philip also engaged in various transactions involving its own stock. Between the fall of 1996 and the fall of 1997, it acquired 18 companies, 15 of them American companies, in stock-for-stock deals. On July 30, 1997 it acquired Serv-Tech, Inc. in exchange for 2.7 million shares of Philip common stock. On July 31, 1997 it acquired Allwaste, Inc., in exchange for 23 million shares of Philip common stock. In October 1997 Philip acquired five American corporations for a combination of cash and Philip stock in the transactions underlying the *Liff* suit.

In November 1997 Philip completed secondary public offerings of its stock in the U.S. and in Canada, raising from American and Canadian investors about $380 million. As detailed elsewhere, plaintiffs contend that the documentation underlying all these transactions was fraudulent.

The proposed class period in *DiRienzo* would extend from February 28, 1996 through and including May 7, 1998. The class would include all purchasers of common stock and call options during that period. The complaint also proposes three subclasses: (a) all purchasers of Philip common stock issued in its November, 1997 public offering pursuant to Philip's November 6, 1997 SEC registration statement; (b) those whose shares of Allwaste, Inc. were exchanged for Philip common stock pursuant to a June 24, 1997 registration statement; and (c) those whose shares of Serv-Tech, Inc. were exchanged for Philip common stock pursuant to a June 24, 1997 registration statement.

There are three groups of defendants in *DiRienzo*: the director-officer defendants, Deloitte & Touche, LLP (Deloitte), and the American underwriter defendants.

The 14 director-officer defendants include ten Canadians resident in Ontario, among whom Robert Waxman, then president of the Metals Recovery Group and a director, is

also a defendant in the Ontario suit brought by Philip, and four Americans, one of whom, Robert L. Knauss, has been since May 1998 chairman of the board of Philip. Another defendant, Norman Foster, served briefly as president of Philip's By-Products Recovery Group. The director and officer defendants generally signed the allegedly false and misleading statements that were part of the public stock offering. Not all of them appear in all the counts in the complaint, but the various claims against some or all of them arise under § 11 (false registration statements), § 12(a)(2) (false prospectuses or oral communications), and § 15 (liability of controlling persons) of the Securities Act, 15 U.S.C. §§ 77k, 77l(a)(2), 77o; §§ 10(b) (manipulative and deceptive devices) and 20(a) (liability of controlling persons and those who aid and abet violations) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78t; and Rule 10b-5, 17 C.F.R. § 240.10b-5 (manipulative and deceptive devices).

Defendant Deloitte is a Hamilton, Ontario partnership comprised solely of Canadian partners. As Philip's outside auditor, Deloitte allegedly rendered unqualified opinions on Philip's 1995, 1996, and 1997 financial statements as well as the financial statements underlying the November 1997 public offering, Allwaste, and Serv-Tech registration statements. The causes of action against Deloitte are also based in federal securities law, specifically Securities Act § 11, Securities Exchange Act § 10(b), and Rule 10b-5. The complaint alleges that Deloitte and the director-officer defendants are liable as direct participants, as participants in a common scheme to defraud, and as co-conspirators in the alleged wrong.

The underwriter defendants are American brokerage and investment banking firms that underwrote the November 1997 American offering. They received commissions for buying large blocks of stock from Philip and then selling the shares to the plaintiffs. The *DiRienzo* complaint seeks either rescission or damages from the defendants under Securities

Act § 12(a)(2). Canadian firms underwrote the Canadian offering and are not defendants in this litigation.

On June 25, 1999 Philip filed for bankruptcy in both Ontario and, through a subsidiary, in Delaware. Accordingly, all actions against it have been automatically stayed. Philip's current directors and officers therefore are third-party witnesses. Philip has also been sued in *Menegon v. Philip Services Corp.*, No. 4166-CP/98 (Ont. Ct. (Gen. Div.) filed May 5, 1998), a Canadian class action brought in Ontario Superior Court on behalf of Canadian residents who purchased Philip shares between February 28, 1996 and April 23, 1998. The *Menegon* defendants include Deloitte and the Canadian underwriters of the November 1997 public offering.

B. *Liff* Suit

The plaintiffs in *Liff* are 14 American individuals, residents of Tennessee, Alabama, and Missouri, who owned stock in five American corporations that Philip purchased in October 1997. They sue Peter Chodos, Philip's former Executive Vice-President, Corporate Development, and four of the director-officer defendants, all five of whom are residents of Ontario. Neither Waxman, Deloitte, nor the underwriter defendants are named as defendants in *Liff*. The Judicial Panel on Multi-District Litigation transferred *Liff* from the Middle District of Tennessee to the Southern District of New York for coordinated pre-trial proceedings. The *Liff* complaint is in two counts: common law negligent misrepresentation and securities fraud under federal law, Securities Exchange Act § 10(b) and Rule 10b-5, and Tennessee law, Tenn. Code Ann. § 48-2-121.

C. District Court Proceedings

The *DiRienzo* plaintiffs appeal from the orders entered on May 18, 1999 and June 19, 1999 in the United States District Court for the Southern District of New York (Mukasey, J.), dismissing their claims on the grounds of *forum non con-*

veniens and denying plaintiffs' motion for reconsideration. The *Liff* plaintiffs appeal from an order entered June 1, 1999 in the same court, dismissing their claims on the same grounds for the reasons given in the order entered in *DiRienzo* on May 18, 1999.

DISCUSSION

I. Forum Non Conveniens

A. In General

A federal court's inherent power to decline to entertain a case over which it has jurisdiction is embodied in the doctrine *of forum non conveniens*. The doctrine serves the ends of justice and the convenience of the parties and their witnesses. *See Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1227 (2d Cir. 1996). The modern doctrine was established by the Supreme Court in *Gilbert* and its companion case *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947). Both cases involved dismissal in one federal court in favor of an alternative American forum. Congress' subsequent enactment of 28 U.S.C. § 1404(a) (substantially adopting the Supreme Court's rationale in its adoption of the doctrine), which authorizes transfers between federal courts, relegated common law *forum non conveniens* to cases where the alternative forum to which a transfer is proposed is a foreign one. *See Schertenleib v. Traum*, 589 F.2d 1156, 1161 (2d Cir. 1978). In these cases we continue to apply the *Gilbert* test, as elaborated in *Koster*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and our own precedents.

To prevail on a *forum non conveniens* motion to dismiss, the defendant must show as a threshold matter that an adequate alternative forum exists. *See Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). A defendant must next demonstrate that the ordinarily strong presumption favoring the plaintiffs chosen forum is countered by the private and public interest factors set out in *Gilbert*, which weigh so

heavily in favor of the foreign forum that they overcome the presumption for plaintiffs' choice of forum. *Gilbert* directs that "unless the balance is strongly in favor of the defendant, the plaintiffs choice of forum should rarely be disturbed," 330 U.S. at 508; *accord R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991); *see also Alfadda v. Fenn*, 159 F.3d 41, 46 (2d Cir. 1998). The burden of proof to demonstrate that the forum is not convenient is on defendant seeking dismissal. *See PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998). Because much of the doctrine's strength derives from its flexibility and each case turns on its own facts, a single factor is rarely dispositive. *See Piper Aircraft*, 454 U.S. at 249-50.

B. Standard of Review

In dismissing a case on the basis of *forum non conveniens*, a district court enjoys wide discretionary latitude to which we give substantial deference. *See id.* at 257. Nonetheless, even recognizing that review in an appellate court is limited by the trial court's broad discretion, the power to review would be authority without purpose were it not a meaningful one. *See Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 92 (2d Cir. 1984). Certainly the reviewing power must encompass the right to determine whether the district court came to an erroneous legal conclusion or a clearly erroneous factual conclusion, *see R. Maganlal*, 942 F.2d at 167; *see also Cooter & Gell v. Hartmarx Comp.*, 496 U.S. 384, 405 (1990) (reviewing Rule 11 sanctions), whether it considered all the relevant factors, and whether its balancing of those factors was reasonable, *see Piper Aircraft*, 454 U.S. at 257.

II. Adequacy of the Alternative Forum

As just observed, the threshold question in the *forum non conveniens* inquiry is whether an adequate alternative forum exists. The alternate forum will normally be adequate so long as the defendant is amenable to process there. *See id.* at 254 & n.22; *Alfadda*, 159 F.3d at 45. An agreement by

the defendant to submit to the jurisdiction of the foreign forum can generally satisfy this requirement. *See, e.g.*, *PT United*, 138 F.3d at 74-75; *R. Maganlal*, 942 F.2d at 167.

On rare occasions, however, the remedy available in the alternative forum may be so unsatisfactory that the forum is inadequate. The mere fact that the foreign and home fora have different laws does not ordinarily make the foreign forum inadequate. To the contrary, "dismissal may not be barred solely because of the possibility of an unfavorable change in law." *Piper Aircraft*, 454 U.S. at 249; *accord Alfadda v. Fenn*, 159 F.3d at 45 ("That the law of the foreign forum differs from American law should ordinarily not be given conclusive or even substantial weight in assessing the adequacy of the forum.").

Even if particular causes of action or certain desirable remedies are not available in the foreign forum, that forum will usually be adequate so long as it permits litigation of the subject matter of the dispute, provides adequate procedural safeguards and the remedy available in the alternative forum is not so inadequate as to amount to no remedy at all. *See Piper Aircraft*, 454 U.S. at 254-55 & n.22; *PT United*, 138 F.3d at 73, 74-75 (Indonesia adequate forum despite unavailability of RICO causes of action); *see also, e.g.*, *Capital Currency Exch., N.V v. National Westminster Bank PLC*, 155 F.3d 603, 609-11 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999) (England adequate forum despite unavailability of Sherman Act and certain common law claims, and despite fact that English courts never had awarded money damages in antitrust case); *Murray v. British Broad. Corp.*, 81 F.3d 287, 292-93 (2d Cir. 1996) (England adequate forum despite plaintiffs claim that American contingency fee system was only way he could afford a lawyer); *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987) (*per curiam*) (dismissing in favor of Philippines forum despite unavailability of RICO causes of action and treble damages); *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147,

159 (2d Cir. 1980) (*in banc*) (dismissing in favor of Trinidad forum despite likelihood that plaintiff, who potentially could recover $8 million in United States, was limited to $570,000 in Trinidad); *Howe* v. *Goldcorp Investments, Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (dismissing securities fraud case in favor of Ontario forum despite some differences in law).

On appeal the *DiRienzo* plaintiffs contend primarily that the unavailability of a "fraud on the market" theory in Canadian securities law makes Ontario an inadequate forum. That theory, established by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988), makes it unnecessary for a plaintiff to prove specific reliance on false information in claims under § 10(b) or Rule 10b-5. Instead, the law presumes that the purchaser relied on the integrity of the process by which a stock price is fixed to reflect accurately all information available in the marketplace. Plaintiffs here argue that Ontario's refusal to adopt this theory makes it an inadequate forum for two related reasons. First, because many potential class members would be unable to allege reliance on the defendants' statements under any other fraud theory, they therefore would be unable to recover damages in Ontario; and second, because absent the fraud on the market theory, the daunting problem of establishing reliance by each class member would require an Ontario court to deny class certification.

The first argument made by the *DiRienzo* plaintiffs is raised for the first time on this appeal. It is well-settled that an appellate court usually will not consider an issue raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106 (1976). We may choose to address a new issue given good reason; for example, to remedy an obvious injustice or if the new issue is purely legal, not requiring additional fact-finding, and capable of decision on the existing record. *See Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994).

We decline to reach these plaintiffs' new argument. It raises complex questions of foreign law: defendants contend

that an Ontario court might choose to apply American law to the securities fraud claims, at least as to plaintiffs who reside and bought the securities in the United States. Nor would all the plaintiffs necessarily need to invoke the fraud on the market theory; presumably, some of them can show reliance on the allegedly fraudulent statements. Concededly, some plaintiffs who would have a remedy in American courts under the fraud on the market theory will be unable to prevail in Canada. But it is far from obvious, especially on this record, who those plaintiffs are or how to distinguish them from others who may succeed in Ontario. Certainly as to the named plaintiffs, further factfinding would be required to determine whether they have any way to demonstrate reliance on Philip's statements. If this issue *had* been raised below, the district court would have been in a better position to address it than we are, particularly with respect to the definition of the proposed class and subclasses.

Plaintiffs did raise the second, procedural issue of whether Ontario law would permit class certification in the district court. The court correctly found that procedural differences do not make Ontario an inadequate forum. *Cf. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195, 199 (2d Cir. 1987) (dismissing U.S, class action in favor of representative suit brought by Indian government in India).

The district court cases on which plaintiffs rely, *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1007 (D.N.J. 1996), and *Trafton v. Deacon Barclays de Zoete Wedd Ltd.*, No. C 93-2758-FMS, Fed. Sec. L. Rep. ¶ 98,481, *available in* 1994 WL 746199, at *12 (N.D. Cal. Oct. 21, 1994), appear to hold that Canadian courts' rejection of the fraud on the market theory means that securities class actions cannot go forward in Canada. Such is not necessarily the case. *See Maxwell v. MLG Ventures Ltd.*, 7 Canadian Cases on the Law of Securities 155, 161 (Ont. Ct. Just. (Gen. Div.) Apr. 27, 1995) (certifying class action for

securities fraud case based on alleged misrepresentations in offering circular); *cf. Carom v. Bre-X Minerals Ltd.*, Nos. 97-GD-39574, 97-GC-41854, 97-GD-42031, 97-GD-42033, 97-GD-42036, 97-GD-42034, 97-GD-42037, 1999 Ont. Sup. C.J. LEXIS 190, at *46-48, *138-40 (Ont. Super. Ct. Just. Sept. 14, 1999) (certifying securities class action as to some claims, including conspiracy claims against defendant corporation and its directors and employees, but not as to others, such as claims against the brokers and financial analysts).

Unlike litigants in U.S. federal court, plaintiffs need not show that common questions "predominate" in order to obtain class certification in Ontario. *Compare* Fed. R. Civ. P. 23(b)(3) *and Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-17 (1997), *with* Declaration of Gerard V. LaForest in Support of Defendant Deloitte's Motion to Dismiss at ¶¶ 12-13, *In re Philip Servs.*, 49 F. Supp. 2d 629 (indicating that Ontario class action law does not require that common questions predominate). Rather, class certification is available in Ontario so long as the class members "raise common issues" and "a class proceeding would be the preferable procedure" for resolving those issues. Class Proceedings Act, R.S.O., ch. 6, § 5(1) (1992), *available in* LEXIS ONTLEG file in the CANADA library. Section (6)(l) of that Act specifically states that class certification may not be denied solely on the grounds that "[t]he relief claimed includes a claim for damages that would require individual assessment after determination of the common issues." Indeed, a class action is already pending in Ontario based on the same alleged fraud as the present cases. *See Menegon*, No. 4166-CP/98.

Plaintiffs also assert that under Canadian law, they would have no viable cause of action against Deloitte or the director-officer defendants and would be left with wholly inadequate remedies against the American underwriter defendants. They rely for that proposition on a negligent misrepresentation case in which the Supreme Court of Canada held that auditors owe no duty of care to the purchasers of

their clients' stock. *Hercules Managements Ltd. v. Ernst & Young*, 146 D.L.R. 4th 577 (Can. 1997), *available in* 1997 DLR LEXIS 1297. They insist that Canadian courts are likely to extend *Hercules Managements* to all fraud claims and therefore that they will have no remedy against Deloitte in Canada. We are unpersuaded.

Canadian law has not yet foreclosed plaintiffs' fraud claims against Deloitte, let alone the individual defendants, and plaintiffs' own expert does not reach the pessimistic conclusion that plaintiffs present on appeal. *See* Declaration of D.H. Jack in Support of Plaintiffs' Opposition to Motion to Dismiss at ¶ 26, *In re Philip Servs.*, 49 F. Supp. 2d 629. In addition, plaintiffs may bring conspiracy and derivative claims against these defendants as well as claims under the Ontario Securities Act, R.S.O., ch. S.5, §§ 130 and 131 (1990). Their expert does not question the availability of these claims, and plaintiffs concede that the remedies available are almost identical to American remedies.

As a consequence, we are satisfied that Ontario is an adequate forum for plaintiffs to litigate the subject matter of *DiRienzo* plaintiffs' dispute. *See Capital Currency*, 155 F.3d at 610 (holding that alternative forum adequate so long as plaintiffs have viable legal argument); *PT United*, 138 F.3d at 74 (noting that adequacy of alternate forum "does not depend on the existence of the identical cause of action"). The differences in law and procedure between the United States and Ontario are not of a kind to render the latter an inadequate forum. The *Liff* plaintiffs do not challenge the adequacy of the alternate forum. Thus, we agree with the district court's conclusion that the threshold question of whether an adequate alternative forum exists in Ontario must be answered in the affirmative. *See In re Philip Servs.*, 49 F. Supp. 2d at 639.

III. Presumption in Favor of Plaintiffs Choice of Forum

Having found an adequate alternative forum, we turn to the district court's application of the *Gilbert* test to the

choice between Ontario and the Southern District of New York. *Gilbert* requires us to apply a strong presumption in favor of the plaintiffs chosen forum when weighing the public and private interest factors favoring each location. *See Murray*, 81 F.3d at 290, and in close cases to defer to plaintiffs choice of forum, *see Gilbert*, 330 U.S. at 508.

The district court erred in concluding that "where, as here, plaintiffs proceed in a representative capacity their choice of forum is entitled to 'less weight'" than the choice of a plaintiff proceeding solely on his own behalf. *In re Philip Servs.*, 49 F. Supp. 2d at 634. After once again reciting the elements of the *Gilbert* test and the need for "proper deference" to the plaintiffs' choice, the court went on to analyze and balance the *Gilbert* factors without further reference to the presumption. *See id.* at 639-43. With regard to *Liff* which is a *direct* action, the district court's decision to accord the plaintiffs' choice of forum less weight was therefore clearly wrong. Even assuming the proposed class action in *DiRienzo* is certified, the district court failed to give plaintiffs' choice of forum the strong presumption to which it is entitled.

In holding that the presumption is weakened in representative suits, Judge Mukasey relied on *Koster* and on two of his own prior decisions. Especially in light of our recent decision in *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000) (decided after Judge Mukasey ruled), we do not believe that *Koster* supports his reading. The plaintiff in *Koster* brought a derivative action in the Eastern District of New York against Lumbermens Mutual Casualty Company, an Illinois company, its president and manager, an Illinois citizen, and another Illinois corporation apparently owned by Lumbermens' president. The district court dismissed the case on *forum non conveniens* grounds, and the Court of Appeals and Supreme Court affirmed. In its discussion of "the special problems of *forum non conveniens* which inhere in derivative actions," 330 U.S. at 521, the Supreme

Court held that the presumption in favor of the plaintiffs home forum is weakened, because "hundreds of potential plaintiffs" could "with equal show of right" have brought suit in their home states, *id.* at 524; because the plaintiff may be "a mere phantom plaintiff" with no personal knowledge that the trial court would find helpful, *id.* at 525, 526; and because the court's administrative role in a class proceeding may require consideration of the relation between the forum and the class as a whole, *see id.* at 525-26.

Important to keep in mind is that immediately preceding this discussion in *Koster*, the Supreme Court focused on the characteristics of a derivative suit, which differ significantly from the class action suit before us. For example, in a derivative action generally only issues of state law are involved and the corporation is the real party in interest, not the shareholder who often has a small financial interest in the suit. *See id.* at 522-24. The Supreme Court observed that these "peculiarities" of a derivative action "should not be overlooked." *Id.* at 524. In contrast, the *DiRienzo* class action involves questions of federal law and the plaintiffs-shareholders are the real parties in interest.

Such distinctions highlight why the reasoning of *Koster* should not be applied to weaken the presumption in favor of the home forum in this case. Such analysis is especially appropriate because as the Supreme Court has repeatedly stated, "[e]ach [*forum non conveniens*] case turns on its facts;" the doctrine is one of pragmatism and flexibility rather than rigid, bright-line rules. *Id.* at 528 (quoting *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 557 (1946)); *accord Piper Aircraft*, 454 U.S. at 249-50.

Beginning with the *Koster* Court's language pertaining to "phantom plaintiffs," such persons may "make no showing of any knowledge by which [their] presence would help to make whatever case can be made in behalf of the corporation." *Id.* at 525. In such circumstances, the need for a plaintiff to try a case in his home forum is diminished be-

cause he need not be personally present to prosecute the lawsuit in the first instance. We are unsure how there could ever be a "phantom plaintiff" in a class action. If brought pursuant to diversity jurisdiction, each lead plaintiff must satisfy the amount in controversy requirement. *See Snyder v. Harris*, 394 U.S. 332, 356 (1969). And, federal jurisdiction may not be exercised over claims of class members who fail to satisfy this requirement. *See Zahn v. International Paper Co.*, 414 U.S. 291, 300 (1973). If a class action were brought pursuant to federal question jurisdiction, the lead plaintiff would in most cases have suffered an alleged violation of a federal statutory or constitutional right, making the label "phantom plaintiff" inappropriate.

The enactment of the Private Securities Litigation Reform Act of 1995 (Securities Reform Act), Pub. L. 104-67, 109 Stat. 737, (codified in scattered sections between 15 U.S.C. § 77 and § 79), further reinforces this notion. Under the Securities Reform Act, any class member may move the district court to appoint "the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members" as lead plaintiff(s). 15 U.S.C. § 77z-l(a)(3)(B)(i). This "most adequate plaintiff" is rebuttably presumed to be the person or group that (a) has filed the complaint or made a motion to be designated as the most adequate plaintiff; (b) has the largest financial interest in the action; *and* (c) meets the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See id.* § 77z-1(a)(3)(B)(iii)(I). Thus, since a "most adequate plaintiff" can be named in a securities action, that person would be other than a phantom party who has little connection to the substantive matters of the case.

The lead plaintiffs in *DiRienzo* bear out this theory. They made Securities Reform Act motions for appointment and are not like the "mere phantom plaintiff[s]" found in *Koster*. Rather, they allege substantial damages. For example, lead plaintiff Toll invested $6.4 million in Philip's stock

and lead plaintiff Gans invested $3.5 million. The alleged fraud affected the lead plaintiffs more profoundly than most and they therefore have a greater interest than most in the conduct and outcome of this litigation. Further, because each has a direct and significant monetary interest in the outcome of the suit, they are unlike plaintiffs in derivative actions who, as the *Koster* Court noted, have only an indirect interest in the litigation. *See Koster*, 330 U.S. at 522-23, 521 (contrasting *Williams*, 326 U.S. 549, a class action brought by a group of debenture holders).

With respect to the *Koster* Court's instruction to consider the relation of the forum to the class as a whole, the proposed class in *DiRienzo* consists predominantly of individuals who bought Philip stock in the United States, or who received it in exchange for shares of American companies. Presumably these individuals are Americans, as Canadians were able to buy Philip stock in Canada. While recognizing that the defendants are mostly Canadian citizens, much of the administrative burden on the Southern District of New York—at least as it is set forth in *Koster* and Rule 23 of the Federal Rules of Civil Procedure—pertains to managing the case with respect to the plaintiffs. Since *forum non conveniens* common law now applies only to actions sought to be removed to a foreign venue, the two fora at issue are a U.S. court or a Canadian court. With the majority of the *DiRienzo* plaintiffs residing in the United States, an American court is best suited to handle this litigation

In light of these observations, the language in *Koster* pertaining to the "hundreds of plaintiffs" can be seen as inapplicable here. Concededly, the American plaintiffs in *DiRienzo* could have gone to a local courthouse in cities around the country and filed suit, but the significant fact is that all of these courthouses are located in the United States. The *DiRienzo* plaintiffs want this case tried in the Southern District of New York, not simply because they prefer that location, but because of the substantive benefits they per-

ceive would ensue from trying this case in the United States. They are not claiming the Southern District of New York "is appropriate *merely* because it is [their] home forum," *Koster*, 330 U.S. at 524 (emphasis added), but rather because they are plaintiffs who have suffered injury both in New York and in the United States, and seek remedies under federal securities law.

The dissent interprets *Koster* as presenting one key question: "Is the plaintiff proceeding in a representative capacity that may diminish the presumed convenience of the chosen forum?" The foregoing illustrates that the answer is "no," and plaintiffs' choice of forum should be given the full deference due it.

IV. Deference to the Choice of a U.S. Forum

Unlike the *Koster* defendants who sought dismissal in favor of Illinois, the *DiRienzo* defendants seek dismissal in favor of a foreign country. Dismissal in favor of a foreign forum has effects on the plaintiffs, particularly with respect to the applicable rules of law, that dismissal in favor of another federal district court simply does not. Indeed, as the Supreme Court explained in *Piper Aircraft*, "[t]he doctrine of *forum non conveniens* . . . is designed in part to help courts [presumably including foreign courts] avoid conducting complex exercises in comparative law." 454 U.S. at 251.

The benefits to these class action resident plaintiffs of suing their case in a U.S. forum is not confined to the suit being brought in a given plaintiffs home district. As *Guidi* stated, the "home forum" of an American citizen *for forum non conveniens* purposes is any "United States court." 224 F.3d at 146; *accord Derensis*, 930 F. Supp. at 1009. We recently reaffirmed this holding, by noting that *Guidi* "illustrates that a plaintiffs U.S. citizenship and residence is entitled to consideration in favor of retaining jurisdiction." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000). While the Southern District of New York may not have a strong relationship with all of the plaintiffs, the

weight of the class certainly is concentrated in the United States. This country's federal courts have a stronger relation to the class as a whole than do Ontario's courts. Our result is not motivated by jingoism, but rather by the sensible consideration that the greater connections a plaintiff has to his chosen forum, the more likely is the inconvenience to him resulting from changing to a foreign forum. *See Wiwa*, 226 F.3d at 102. The district court therefore should have given full weight to the plaintiffs' choice of forum. Its failure to apply this rule of law was an abuse of its discretion. *See id.* at 103; *Guidi*, 224 F.3d at 148.[2]

V. Public and Private Interest Factors

A. Public Interest Factors

We turn finally to the public and private interest factors to see if they shift the balance away from plaintiffs' choice of forum. In *Gilbert*, the Supreme Court outlined four public interest factors for courts to weigh in the *forum non conveniens* inquiry: (1) administrative difficulties associated with court congestion; (2) the unfairness of imposing jury duty on a community with no relation to the litigation; (3) the "local interest in having localized controversies decided at home;"

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[2] *Guidi* and *Wiwa* are not limited to their facts, as the dissent argues. In *Guidi*, after concluding the defendant "did not carry its burden under *Gilbert* and *Koster* to demonstrate that the balance of conveniences tipped strongly in its favor," we observed that "the substantial and unusual emotional burden on Plaintiffs" if the case were tried in Egypt "provides *additional support* for keeping the case in their chosen forum." 224 F.3d at 147 (emphasis added). The use of the phrase "additional support" suggests we would have found in the plaintiffs' favor in any event. Nor is the analysis in *Wiwa* based on the particular facts of that case either. Rather, the opinion notes that when deciding a motion to dismiss under *forum non conveniens* our case law and that of the Supreme Court have established a rule of deference to a U.S. forum for a U.S. resident plaintiff. *See* 226 F.3d at 102.

and (4) avoiding difficult problems in conflict of laws and the application of foreign law. 330 U.S. at 508-09.

1. *Administrative Difficulties.* The first factor does not strongly favor either party. There is evidence that Ontario courts, like the Southern District of New York, suffer from congestion. There may be some administrative advantage in dismissing *DiRienzo* in Ontario's favor because *Menegon*, a similar case involving a class of only Canadian plaintiffs, is already pending there. Although the issues in the two cases will obviously overlap, they also differ somewhat because *DiRienzo* will involve the contents of American registration statements and the likely application of American law to most of the claims. In any event, this circumstance is of little weight because, as we noted in *Guidi*, the existence of related litigation is not one of the factors enumerated in *Gilbert*. *See* 203 F.3d at 185.

2. *Jury Duty Imposed on Community With no Relation to Controversy.* As explored more fully in the next section, the U.S. has a local interest in this lawsuit. Where American investors have allegedly suffered harm from purchases they made in the United States, local juries have an interest in redressing that harm.

3. *Local Interest.* The district court erred by finding that the local interest factor weighed heavily in favor of litigation in Ontario. *See In re Philip Servs.*, 49 F. Supp. 2d at 642. It failed to acknowledge as a factual matter that many of the plaintiffs' securities transactions were conducted entirely in the United States, by Americans, in American dollars, on American stock exchanges. Its conclusion that "[p]arties who choose to engage in international transactions, as plaintiffs did here, 'cannot expect always to bring their foreign opponents into a United States forum,'" 49 F. Supp. 2d at 642, is inapplicable to the bulk of the American plaintiffs. These plaintiffs bought shares on the NYSE or NASDAQ and relied on statements filed with the SEC, disclosing that most of Philip's business was conducted in the

United States; in addition, defendants include Americans as well as foreigners. Admittedly, the *Liff* plaintiffs and those in the proposed Allwaste and Serv-Tech subclasses received their shares in stock-for-stock exchanges and were presumably aware that they were negotiating with representatives of a Canadian company. However, even they were approached in the United States.

The presence of the small minority of potential Canadian class members in *DiRienzo* who bought their securities in Canada does not change this analysis. In *Wiwa*, we ruled that the district court applied a "faulty" standard of law in failing to "count in favor of retention [of jurisdiction] that two of the [four] plaintiffs were residents of the United States." 226 F.3d at 103. *A fortiori*, when more than half of the plaintiffs are U.S. residents, and only a small minority of them reside in Canada, the same principle must govern.

The cases the district court cited for its conclusion do not bind us, and two involved facts easily distinguishable from those at bar. In *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 712 (2d Cir. 1987), an American corporation had purchased a majority interest in one Israeli corporation from a second Israeli corporation. *See id.* at 123-25. The contracts at issue had been negotiated and executed in Israel, and the purchaser had hired an Israeli attorney for the negotiations. The district court correctly held that the case should be dismissed in favor of Israel as a forum. *See id.* at 127-30. Similarly, the First Circuit's decision in *Howe* emphasized that the Canadian stock that was the subject of the alleged securities fraud was traded only on Canadian stock exchanges, and that its sellers had made no effort to market it in the United States except in response to unsolicited inquiries. *See* 946 F.2d at 953.

In other cases where we have affirmed *forum non conveniens* dismissals, the transactions at issue had little or no connection with the U.S. *See, e.g., Alfadda*, 159 F.3d at 46-

48 (affirming dismissal of Saudi Arabian investors' suit against Netherlands Antilles corporation over conduct of French bank owned by corporation, where all documents and witnesses were in France or Saudi Arabia and documents were in French and no plaintiffs were American); *Scottish Air Int'l v. British Caledonian Group, PLC*, 81 F.3d 1224, 1233-34 (2d Cir. 1996) (affirming dismissal where American shareholder sued over the right to a seat on the board of directors of a Scottish corporation, considered to be a decision of internal management); *Alcoa Steamship*, 654 F.2d at 149 (affirming dismissal of admiralty action brought by American resident and arising out of the collision of Alcoa's ship with a pier located in Trinidad); *Calavo Growers of California v. Belgium*, 632 F.2d 963, 965-66 (2d Cir. 1980) (affirming dismissal of breach of contract and fraud action arising out of fig insurance policies negotiated and purchased by parties' brokers in Belgium and possibly involving questions of insurance industry usage in Belgium and the pre-shipment condition of the figs in Turkey).

In contrast, *DiRienzo* and *Liff* do not involve Americans who sought out involvement with a foreign forum. It was Philip who came to them by registering its stock on American exchanges, filing statements with the SEC, and conducting the bulk of its business—including multiple corporate acquisitions—in the United States.

The final case on which Judge Mukasey relied involved facts more similar to those before us. *See DeYoung v. Beddome*, 707 F. Supp. 132, 133-34 (S.D.N.Y. 1989). In *DeYoung* the presumption in favor of plaintiffs' chosen forum was discounted because the case was brought as a class action. It appeared clear there that Canadian law would apply, but it is unclear from the opinion how many of the shareholders were American. Further, the case was actually decided on grounds of international comity, *see id.* at 134, and its *forum non conveniens* comment was *dictum*, *see id.* at 138.

Most of the plaintiffs here were Americans who conducted the disputed transactions entirely in the United States and relied on statements filed with the SEC. This lawsuit is not simply about "the conduct of a major corporation in Canada, notwithstanding the involvement of some American entities and persons," as described by the district court. *See In re Philip Servs.*, 49 F. Supp. 2d at 642. Rather, the plaintiffs are involved in this lawsuit precisely because of aggressive techniques by the Canadian corporation *within* the U.S. that targeted U.S. investors. To describe the transactions as did the district court is to misconstrue the factual basis for the lawsuits.

As the SEC argues in its *amicus curiae* brief, dismissing this case is no more appropriate than dismissing a products liability case brought in the United States against Toyota simply because the design and manufacture of the automobile took place in Japan. While the complaint alleges a fraud that was largely executed in Ontario, neither the dissemination of the allegedly misleading statements nor the plaintiffs' losses were localized there.

Because the *Gilbert* test is so fact-specific, a district court's erroneous understanding of facts central to a case can preclude a reasonable balancing of the *Gilbert* factors and form the basis for reversal on appeal. *See R. Maganlal*, 942 F.2d at 168 (district court abused its discretion where its misidentification of the "fundamental issue in the case" "tainted the court's entire forum non conveniens analysis"); *Overseas Programming Cos., Ltd. v. Cinematographische Commerz-Anstalt*, 684 F.2d 232, 235 (2d Cir. 1982) (district court erred in its balancing of the *Gilbert* factors because it "failed to identify the basic issue in the lawsuit.").

4. *Avoiding Conflicts of Law Problems.* The district court correctly noted that while an Ontario court would likely apply American law to at least the claims arising under §§ 11 and 12(a) of the Securities Act, an American court would likely apply Canadian law to claims by non-resident

class members based on the purchase of securities outside the United States. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 127-29 (2d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975). Thus the interest in avoiding the application of foreign law does not favor either forum.

But the district court failed to give sufficient weight to the United States' interest in having its securities laws govern the protection of U.S. investors and its interest in the integrity of the U.S. securities market. The district court noted the interest but emphasized repeatedly that it is not "determinative" or "overriding" and noted the foreign forum's interest in applying its own securities laws. *In re Philip Servs.*, 49 F. Supp. 2d at 642-43. We have recognized the interest courts of the United States have in enforcing United States securities laws. *See Alfadda*, 159 F.3d at 47; *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993). On these facts, this factor deserved a great deal more weight than the district court accorded it.

Further, there is a strong public interest favoring access to American courts for those who use American securities markets. The fraud on the market theory itself illustrates investors' reliance on accurate and complete information. For securities markets to function efficiently, securities fraud law must be clear and enforceable. *See Basic*, 485 U.S. at 245-47. As the statute explaining the need for regulation and control of transactions in securities exchanges and over-the-counter markets states, these transactions are "affected with a national public interest." Securities Exchange Act of 1934, § 2, 48 Stat. 881, 15 U.S.C. § 78b. Thus, those laws must also be applied consistently with regard to the significant majority of the putative class who bought their securities on American markets.

Moreover, the United States has a strong interest in enforcing its securities laws. *Cf. Howe*, 946 F.2d at 953 (ex-

plaining that federal securities laws are *not* meant to protect those who purchased their securities *abroad*). Ontario has an analogous interest with respect to Canadians who bought their Philip stock in Ontario, but they are a small minority of the proposed class and Ontario's interest is correspondingly less. As to the *Liff* plaintiffs, they acquired all their Philip shares in stock-for-stock exchanges negotiated in or from the United States. Ontario therefore has little interest in enforcing its securities laws with respect to them. Hence, the public interest factors strongly favor an American forum for this securities litigation.

B. Private Interest Factors

The private interest factors enumerated in *Gilbert* include: (1) ease of access to evidence; (2) the availability of compulsory process to compel the attendance of unwilling witnesses; (3) the cost of willing witnesses' attendance; (4) if relevant, the possibility of a view of premises; and (5) all other factors that might make the trial quicker or less expensive. *See Gilbert*, 330 U.S. at 508; *Alfadda*, 159 F.3d at 46. Only the first two *Gilbert* private interest factors, ease of access and the availability of compulsory process, are relevant in the present cases.

As we analyze these private factors, we reiterate that plaintiffs should not be deprived of their choice of forum, except upon defendants' clearly showing that a trial there would be so oppressive and vexatious to defendant as to be out of all proportion to plaintiffs' convenience. *See Koster*, 330 U.S. at 524. We do not think defendants have made such a showing. With respect to the first factor, the bulk of the relevant documents do appear to be in Ontario, at either Philip's or Deloitte's Hamilton facilities. However, the need to photocopy and ship documents is hardly unprecedented in American litigation. *Cf. Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996) ("To the extent documents exist in England, advances in transportation and communication accord this issue less weight."). Nor have the defen-

dants explained how these tasks would be "oppressive" or "vexatious."

With respect to process to compel unwilling witnesses, it appears that most of the potential witnesses with direct knowledge of the alleged fraud are also located in Ontario. (In *Liff* which involved negotiations, the testimony of the American plaintiffs will be more important than in *DiRienzo.*) However, willing witnesses can easily travel from Toronto to New York by a direct 90-minute flight. Hamilton is less than an hour's drive from Toronto. Such travel is not burdensome by modern standards, and the defendants have not shown otherwise.

The most important problem with conducting this litigation in the United States is the unavailability of process to compel unwilling witnesses. Former Philip employees such as Peter McQuillan, the former comptroller of Philip's Scrap Metals Division, reside in Canada and thus are not subject to process in American courts. Unlike an American court, a Canadian court could compel Canadian witnesses to testify. Live testimony is especially important in a fraud action where the factfinder's evaluation of witnesses' credibility is central to the resolution of the case. *See Alfadda*, 159 F.3d at 48; *Schertenleib*, 589 F.2d at 1165.

Despite the fact that this factor weighs in favor of Ontario, we note that the district court failed to consider letters rogatory to compel these witnesses' appearance for deposition, even though we have recognized the availability of this procedural tool as relevant in deciding whether plaintiffs' chosen forum is inconvenient. *See, e.g., Overseas Programming Cos.*, 684 F.2d at 235 ("any difficulties . . . regarding witnesses whose attendance the Court is unable to compel can most likely be resolved by the use of deposition testimony or letters rogatory"); *see also In re Livent, Inc.*, 78 F. Supp. 2d 194, 211 (S.D.N.Y. 1999). Although demeanor evidence is important when trying a fraud case before a jury, *see Howe*, 946 F.2d at 952, videotaped depositions, obtained

through letters rogatory, would afford the jury an opportunity to assess the credibility of these Canadian witnesses.

Consequently, on the evidence presented, the private interest factors fall far short of clearly showing that trial in the Southern District is oppressive or vexatious to defendants. As a consequence, the public and private interest factors have not overcome the strong presumption that must be accorded plaintiffs' choice of forum. Even were the balance of factors considered close, *Gilbert* tells us we must defer to plaintiffs choice because unless the balance strongly favors defendant, plaintiffs' choice of forum "should rarely be disturbed." 330 U.S. at 508.

CONCLUSION

In sum, the district court erred in both *DiRiemizo* and *Liff* giving less deference to the plaintiffs' choice of forum and by failing to accord proper significance to the choice of a U.S. forum by the American plaintiffs. The district court abused its discretion by allowing these errors to infect its *Gilbert* analysis, especially with respect to the interest of the U.S. in deciding these matters which arose out of the sales of securities in this country.

Accordingly, the orders dismissing the *DiRienzo* action and the *Liff* action on the grounds *of forum non conveniens* are reversed and the cases are remanded to the Southern District of New York for further proceedings. We decline the *Liff* plaintiffs' request that we remand their case to the District of Tennessee on the understanding that pre-trial proceedings are not yet complete.

JOSÉ A. CABRANES, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion reversing the decision of the District Court to dismiss these suits on the ground *of forum non conveniens*. The majority opinion places unnecessary and novel restrictions on what until now has been a district court's broad discretion to grant *forum non conveniens* dismissal in any action in which some of the plaintiffs reside in the United States. If this ruling stands—and I hope that it will not—a new doctrinal approach, invented today, will govern such lawsuits.

I would remand *Liff* for the reasons stated at III below, and I would affirm *DiRienzo* for reasons well stated by Judge Mukasey in his careful and comprehensive opinion, *see In re Philip Services Corp. Sec. Litig.*, 49 F. Supp. 2d 629, 634 (S.D.N.Y. 1999) ("*DiRienzo*"). The majority errs, in my view, by: (1) paying mere lip service to the proper standard of review—for clear abuse of discretion—while unabashedly substituting its own views for those of the District Court; (2) improperly criticizing the District Court for characterizing the relevant transactions as international; (3) concluding that the United States' interest in enforcing its securities laws is entitled to "a great deal more weight" than was afforded by the District Court, despite the fact that we have repeatedly stated that this interest is merely "one consideration"; (4) dismissing the District Court's consideration of the location of the bulk of the relevant documentary evidence in the alternative forum, even though we have made it clear that this is a legitimate factor for a trial court to weigh in any *forum non conveniens* analysis; (5) ignoring those cases in which we have expressed a clear preference for live witness testimony, especially in fraud actions; and (6) incorrectly affording a strong presumption to the forum choice of plaintiffs who are not alleged to reside in the purported "home forum" and who seek to represent a class of investors stretching across the United States and Canada.

We have only recently recalled that our "review of a *forum non conveniens* dismissal is severely cabined. The decision lies wholly within the broad discretion of the district court and should be reversed only if that discretion has been clearly abused." *Alfadda v. Fenn*, 159 F.3d 41, 45 (2d Cir. 1998) (internal citations, alteration, and quotation marks omitted); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *Scottish Air Int'l, Inc. v. British Caledonian Group PLC*, 81 F.3d 1224, 1232 (2d Cir. 1996) (Cardamone, J.) ("our review in this area of law is quite constrained"). The majority misapplies this standard of review, ignores binding precedents of our own Court, and incorrectly interprets the seminal Supreme Court decision on point.

In undertaking a *forum non conveniens* analysis, a court first must determine whether there exists an adequate alternative forum, and then, if there is such a forum, must weigh the relevant public and private interest factors to determine which forum "will be most convenient and will best serve the ends of justice." *Alfadda*, 159 F.3d at 45-46 (internal quotation marks omitted). In assessing convenience, there "is ordinarily a strong presumption in favor of the plaintiffs choice of forum." *Murray v. BBC*, 81 F.3d 287, 290 (2d Cir. 1996). Because I agree with the majority that Canada is an adequate forum in which to litigate these actions, I first discuss the majority's improper handling of the public and private interest factors and then turn to whether the usual "strong presumption" in favor of the plaintiffs' choice of forum should apply in a representative action in which the plaintiff class is spread across the United States and Canada.[1]

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[1] I primarily address the majority's handling of *DiRienzo v. Philip Services Corp.*, No. 99-7825 ("*DiRienzo*"), and then turn briefly in Part III to *Liff v. Chodos*, No. 99-7776 ("*Liff*").

I. The District Court Did Not Clearly Abuse its Discretion in Weighing the *Gilbert* Factors

We have explained that in *a forum non conveniens* analysis

> [t]he public interests to be considered include: (1) having local disputes settled locally; (2) avoiding problems of applying foreign law; and (3) avoiding burdening jurors with cases that have no impact on their community. The private interests embrace: (1) ease of access to evidence; (2) the cost for witnesses to attend trial; (3) the availability of compulsory process; and (4) other factors that might shorten trial or make it less expensive.

Capital Currency Exch., N.V v. National Westminster Bank PLC, 155 F.3d 603, 609 (2d Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999); *see also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Before today it was the rule that the decision "to grant or deny a motion to dismiss a cause of action under the doctrine of *forum non conveniens* lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been clearly abused." *Scottish Air*, 81 F.3d at 1232. At every stage of its analysis of the District Court's balancing of the *Gilbert* factors, the majority strays far beyond this "extremely limited" review, *Capital Currency*, 155 F.3d at 609.

Judge Mukasey, after a thoughtful review of the record, concluded that the public interest factors were in relative equipoise and that the private interest factors strongly favored litigation in Ontario. *See DiRienzo*, 49 F. Supp. 2d at 640-43. These conclusions are well-grounded in the record and well within a district court's sound discretion; they should not be disturbed.

A. The District Court Did Not Clearly Abuse its Discretion in Weighing the Public Interest Factors

With regard to the public interest factors, Judge Mukasey found that: (1) neither docket congestion nor potential problems in applying foreign law favored one forum over another, *see id.* at 642; (2) the interest in having local controversies settled locally favored litigation in Ontario, because the matter concerns the conduct in Canada of a Canadian corporation, *see id.* (citing *Alfadda*, 159 F.3d at 46 (concluding that France had a "far greater interest" in litigation concerning the conduct of a French bank than did the United States)) and (3) while the United States has an interest in applying its own securities laws, that interest is not overriding, *see id.* at 642-43 (citing *Alfadda*, 159 F.3d at 47, and *Capital Currency*, 155 F.3d at 611).

In concluding that the private interest factors weighed heavily in favor of dismissal and litigation of the cause in Ontario, Judge Mukasey relied on: (1) the availability in Ontario of several important third-party witnesses who would not be subject to subpoena in the Southern District of New York;[2] (2) the location of most if not all of the important defendants and defense witnesses in Ontario, where Philip is headquartered; and (3) the fact that the "vast bulk" of the relevant documentary evidence is located in Ontario. *See id.* at 640-41. Our recent decisions demonstrate that each of these is an appropriate consideration in deciding whether to dismiss on the ground of *forum non conveniens*, *see Alfadda*,

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[2] Specifically, the District Court noted that "among others," Peter McQuillan, the former Comptroller of the Scrap Metals Division of Philip Services Corp. ("Philip"), and Greg Madesker and Rik Barrese, former traders in Philip's Metals Recovery Division, could not be compelled to testify by an American court. *Id.* at 640. The Court explained that "[t]he conduct of these parties is central to the allegations in plaintiffs' complaint, and will likely be crucial in resolving the dispute." *Id.*

159 F.3d at 47-48; *Capital Currency*, 155 F.3d at 611, and it is clear that Judge Mukasey properly exercised his discretion in balancing the private interest factors. The majority's conclusion otherwise is flatly at odds with our cases.

1. The Relevant Transactions Were "International"

The majority's conclusion that Judge Mukasey clearly abused his discretion in weighing the *Gilbert* factors is based on a number of dubious grounds. First, the majority criticizes at length Judge Mukasey's characterization of the relevant purchase transactions as "international." *DiRienzo*, 49 F. Supp. 2d at 642. According to the majority, this characterization "misconstrue[s] the factual basis for the lawsuits," *ante* at 65, and led Judge Mukasey to an "erroneous understanding of the facts central to [the] case" *ante* at 65, and, thus, to an unreasonable balancing of the *Gilbert* factors. The majority's position is not supported by the record. First, it is undisputed that "Philip is a Canadian corporation which maintains its principal executive offices" in Hamilton, Ontario, Canada. Second, approximately $94 million of the $380 million of Philip common stock offered by the company in the relevant period was sold by Canadian underwriters to investors outside the United States; these investors are members of the proposed *DiRienzo* class. Finally, a large percentage of the proposed class received Philip stock when Philip acquired American companies in stock swaps; it cannot seriously be disputed that the acquisition of an American company by a Canadian company is an international transaction. In light of the evidence in the record, the criticism of the District Court for having described the relevant transactions as "international" is misplaced.

The majority appears intent on proving that the transactions at issue in this case were connected to the United States and that we have only affirmed *forum non conveniens* dismissals in cases where "the transactions at issue had little or no connection with the U.S." *Ante* at 64. However, none of

our prior cases establishes any ceiling of connection to the United States above which *forum non conveniens* dismissal is unavailable. Moreover, it seems unlikely that such a ceiling could be established—even if one were desirable—because of the difficulty of articulating absolute criteria by which to measure connections to the United States against competing connections to a foreign country.

2. The United States' Interest in Enforcing its Securities Laws is "Merely One Consideration

After insisting that the transactions in question were connected to the United States, the majority criticizes the District Court's conclusion that Ontario's interest in *DiRienzo* outweighs the United States' interest. Interestingly, the majority does not claim that Ontario lacks a substantial interest in hearing the case, or that the District Court improperly considered this interest in its *Gilbert* analysis. Nor could it fairly do so, for the District Court's consideration of the alternative forum's interest is fully consistent with our prior decisions. *See, e.g.*, *Alfadda*, 159 F.3d at 46; *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993). Instead, the majority simply finds that the District Court "failed to give sufficient weight to the United States' interest in having its securities laws govern the protection of U.S. investors and its interests in the integrity of the U.S. securities market." *Ante* at 65. Nowhere is it more obvious that, instead of reviewing for "clear abuse of discretion," the majority opted to undertake its own *de novo* review, simply substituting its view of the matter for that of the District Court.

It is no coincidence that the majority fails to account for our recent statement that the interest of the United States in enforcing its securities laws "*is merely one consideration* to be weighed in the totality of the *Gilbert* analysis." *Alfadda*, 159 F.3d at 47 (emphasis added) (affirming *forum non conveniens* dismissal of securities action); *see also Allstate*, 994

F.2d at 1002 (same) (citing *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.) (same)). It is not disputed that the District Court, in its *DiRienzo* opinion, considered the interest of the United States in enforcing its own securities laws in weighing the relative public interests in hearing the case. *DiRienzo*, 49 F. Supp. 2d at 643. Indeed, the majority concedes that "[t]he district court noted the [United States'] interest," but nevertheless complains that the District Court "emphasized repeatedly that [the interest] is not 'determinative' or 'overriding' and noted the foreign forum's interest in applying its own securities laws." *Ante* at 65. The District Court gave the matter exactly what *Alfadda* requires: consideration.[3] In demanding *heightened* consideration of the United States' interest, the majority substitutes its own views of the proper balance for those of the District Court, in plain disregard for our precedents and the applicable standard of review.

B. The District Court Properly Weighed the Private Interest Factors

1. The District Court Properly Considered the Location of the Relevant Documentary Evidence

The majority's criticism of the District Court's balancing of the private interest factors is similarly misguided. First, it takes issue with the District Court's decision to place some weight on the fact that "the vast bulk of the relevant documentary evidence is in Ontario," *DiRienzo*, 49 F. Supp.

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[3] In my view, the District Court's statement that the connection with the United States did not warrant "significant" consideration, *DiRienzo*, 49 F. Supp. 2d at 642, understates the strong interest our nation surely has in protecting the integrity of its securities markets. Nevertheless, despite this rhetorical flourish, it is apparent that the District Court properly and adequately considered the United States' interest in enforcing its securities laws; this is all that is required of a district court in these circumstances.

2d at 641, informing us that "the need to photocopy and ship documents is hardly unprecedented in American litigation," *ante* at 66 (relying on an opinion of the District of Connecticut as authority). No one disputes—no one can dispute—that "the need to photocopy and ship documents is hardly unprecedented in American litigation." however, the relevant issue here is not whether there are precedents for photocopying and shipping documents, but whether the District Court clearly abused its discretion in taking into account the location of the "vast bulk" of the documentary evidence. The answer, clearly, is "no." In both *Alfadda* and *Capital Currency*, we noted with approval that the trial courts had concluded that private interest factors strongly favored litigation in the alternative fora, partly because "*nearly all* the documentary evidence," *Alfadda*, 159 F.3d at 47 (emphasis in original), or "most of the documentary evidence," *Capital Currency*, 155 F.3d at 611, was located abroad, *see also Scottish Air*, 81 F.3d at 1233. There can be no doubt that the District Court's consideration of the situs in Ontario of the "vast bulk of the relevant documentary evidence" was wholly appropriate.

2. The District Court's Balancing Properly Reflects Our "Strong Preference" for Live Witness Testimony, Particularly in Fraud Actions

Moreover, the majority unconvincingly attempts to diminish the importance of the District Court's finding that "it is in Ontario that most of the key witnesses . . . can be found," a fact that the District Court properly concluded was "most significant." *DiRienzo*, 49 F. Supp. 2d at 640. We have explained that "[t]he ability to secure witness testimony takes on added importance . . . because 'where, as here, appellants have alleged fraud, *live* testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor.'" *Alfadda*, 159 F.3d at 48 (emphasis added) (quoting *Allstate*, 994 F.2d at 1001); *see also Scottish Air*, 81

F.3d at 1233 (live witness testimony crucial for jury to assess witness credibility, notwithstanding possibility of deposition); *Howe*, 946 F.2d at 952 ("fraud and subjective intent are elements of the claim, making the *live testimony* of witnesses for the purposes of presenting demeanor evidence essential to a fair trial" (emphasis added)); *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978) (explaining that "[s]ince the crux of this litigation is the truth or falsity of [defendant's] charges that plaintiff is a swindler, to be able to take the alleged co-conspirators' testimony by letter rogatory only would be a very serious handicap" in that it would prevent "*live cross-examination* before a factfinder" (emphasis added)). Accordingly, it was entirely appropriate for the District Court to emphasize this factor in determining that the private interest factors strongly favor litigation in Ontario.

With but a glancing acknowledgment of our cases asserting a clear preference for live testimony in a fraud action, *see ante* at 66, the majority notes that "the district court failed to consider letters rogatory to compel these witnesses' appearance for deposition," *ante* at 66, as well as the possibility of showing the jury videotaped depositions. The majority further states that "we have recognized the availability of [letters rogatory] as relevant in deciding whether plaintiffs' chosen forum is inconvenient. *See, e.g., Overseas Programming Cos. v. Cinematographische Commerz-Anstalt*, 684 F.2d 232, 235 (2d Cir. 1982)." *Ante* at 66. This statement is misleading. In *Overseas Programming* we specifically concluded that "many of the relevant witnesses reside or are doing business in the United States, which makes New York a more convenient forum than any one of the foreign locations in which litigation has already been commenced." *Overseas Programming*, 684 F.2d at 235. In *DiRienzo*, by contrast, the District Court concluded—and the majority does not dispute—that "most of the key witnesses" are to be found in Ontario, where a parallel action has been commenced. *DiRienzo*, 49 F. Supp. 2d at 640. We have never

before *required*, as the majority does here, that a district court consider the use of videotaped testimony in weighing this factor, *see Alfadda*, 159 F.3d at 48;[4] *Allstate*, 994 F.2d at 1001, and we have specifically rejected similar attempts to substitute some other form of testimony in lieu of *live* witness testimony before the trier of fact, *see Scottish Air*, 81 F.3d at 1233; *Schertenleib*, 589 F.2d at 1165. In concluding that the District Court clearly abused its discretion by failing to consider that the videotaped testimony of non-available, crucial witnesses could be offered in place of live testimony, the majority has simply elected to ignore our prior decisions.

For all these reasons, I dissent from the majority's conclusion that the District Court clearly abused its discretion in weighing the *Gilbert* factors and dismissing the *DiRienzo* action on *forum non conveniens* grounds. Accordingly, I would affirm the dismissal.

II. The *DiRienzo* Plaintiffs' Choice of Forum Was Not Entitled to a Strong Presumption

Although the majority distorts or ignores a host of controlling decisions, its unduly narrow interpretation of *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947), merits particular attention. As Judge Mukasey recognized, in adjudicating a motion to dismiss on the ground of *forum non conveniens*, "[t]here is ordinarily a strong presumption in favor of the plaintiffs choice of forum. Thus, dismissal usually is not appropriate unless the balance of convenience tilts strongly in favor of trial in the foreign forum." *DiRienzo*, 49 F. Supp. 2d at 634 (alteration in original) (internal citation and quotation marks omitted). However, as he noted, the Supreme Court has stated that this pre-

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[4] We can be certain that the *Alfadda* Court was fully aware of the existence of both letters rogatory and the possibility of videotaping when it reiterated just two years ago our preference for live—as opposed to taped—witness testimony.

sumption is entitled to less weight when a plaintiff chooses to proceed on behalf of a broad class of plaintiffs, each of whom has an equal right to litigate in his home forum. *See id.* (citing *Koster*, 330 U.S. at 524). The majority concludes—in my view, incorrectly—that the *Koster* limitation on the "strong presumption" generally afforded to a plaintiffs chosen forum does not apply in *DiRienzo*.

A. The Majority Misstates the District Court's Conclusion

The majority concludes that the District Court erred in "fail[ing] to give plaintiffs' choice of forum the strong presumption to which it is entitled." *Ante* at 60. This criticism, however, is flatly wrong. As the District Court noted, the forum choice of plaintiffs who have opted to represent the interests of a class of investors spread across the continent is entitled to "*less* weight" than the choice of a plaintiff proceeding only on his own behalf. *DiRienzo*, 49 F. Supp. 2d at 634 (emphasis added).

B. Koster Should Not be Confined to Derivative Actions

In criticizing the District Court, the majority misinterprets the very thrust of *Koster* and, thus, its application to *DiRienzo*. *Koster* involved a derivative action brought by a policyholder of Lumbermens Mutual on behalf of all its members and policyholders. *See Koster*, 330 U.S. at 519. Affirming dismissal on the ground of *forum non conveniens*, the Supreme Court explained:

> Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiffs home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiffs convenience,

> which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown. *But where there are hundreds of potential plaintiffs*, all equally entitled voluntarily to invest themselves with the corporation's cause of action and *all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.*

Id. at 524 (emphases added). This principle is fully applicable in *DiRienzo*.

Though *Koster* concerned a derivative action—hence the reference above to "the *corporation's* cause of action"—the logic of the opinion applies with equal force to other representative actions. Here, as in *Koster*, the lead plaintiffs assumed responsibility for representing the interests of many others. The parties do not dispute, and the majority does not deny, that each member of the proposed class—at least each member residing in the United States—could have filed a complaint at his local courthouse in Chicago, Sacramento, or Tallahassee, asserting substantive claims identical to those set forth in the *DiRienzo* complaint. Faced with a similar situation in *Koster*, the Supreme Court concluded that "where there are hundreds of potential plaintiffs . . . all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Id.* So too in this case. Having made a strategic choice to proceed on behalf of an international

class, the *DiRienzo* plaintiffs have no legitimate grounds to complain of the consequences.

Judge Mukasey's conclusion that the forum chosen by representative plaintiffs proceeding on behalf of a class dispersed across the continent is entitled to less weight is dictated by simple logic. In a direct action, a plaintiffs choice of forum is afforded a strong presumption because it is assumed that the home forum is the most convenient venue for the plaintiff. *See Piper Aircraft*, 454 U.S. at 255-56 (explaining that "a plaintiffs choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient." (citation omitted)); *see also Murray*, 81 F.3d at 290. However, as the Supreme Court recognized in *Koster*, that presumption makes little sense when the plaintiffs are dispersed across the nation and have had the forum selected for them by a representative plaintiff. Accordingly, there is no reason to confine the teaching of *Koster* to derivative actions. Although the majority points to some differences between this case and a derivative action, *see ante* at 60-61, its analysis is not dispositive of why *Koster's* rationale should not apply with equal force to the representative action at stake in *DiRienzo*, in which the plaintiffs likewise are found throughout the nation (not to mention Canada).[5]

Following *Koster*, a district court should discount a plaintiffs forum choice after asking a single question: Is the plaintiff proceeding in a representative capacity that may diminish the presumed convenience of the chosen forum? Judge Mukasey considered the evidence and answered "yes" to that question. The bedrock of our *forum non conveniens* jurisprudence has always been that an appellate court should

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[5] Moreover, unlike *Koster*, not even the lead *DiRienzo* plaintiffs have alleged that they reside within the district in which they filed suit.

not substitute its own answer in place of the "sound discretion" of the district judge, who is closest to the case.

C. The Lead Plaintiffs' Financial Stake in the Action is Irrelevant

In concluding that Judge Mukasey misapplied *Koster* because the *DiRienzo* representatives are not "mere phantom plaintiff[s]," but instead have a significant financial stake in the action, *ante* at 61, the majority further distorts the language and logic of *Koster*. The passage in *Koster* from which the majority draws the notion of a "mere phantom plaintiff" reads as follows:

> While, even in the ordinary action, the residence of the suitor will not fix the proper forum without reference to other considerations, it is a fact of high significance. But, in derivative actions, *although the plaintiff may have a substantial interest of his own to protect*, he may also be a *mere phantom plaintiff* with interest enough to enable him to institute the action and little more. He may have taken some active part in the corporate affairs, or have personal knowledge of them, or have had dealings in course of protest and objection which make it requisite or at least expedient for him personally to be present at the trial. Or he may, like this plaintiff, make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation.

Koster, 330 U.S. at 525 (emphases added) (internal quotation marks omitted). Thus, the Supreme Court made it clear in *Koster*—in the *very paragraph* from which the majority quotes but a fragment, out of context—that the lead plaintiff in some representative actions *will* have a substantial stake in the litigation, but nonetheless *will not* be entitled to the usual strong presumption in favor of his choice of forum. The presumption, then, turns not on the extent of the lead plaintiffs financial interest, but rather, on whether the action is brought

solely on the plaintiffs own behalf or on behalf of others as well. The majority to the contrary notwithstanding, under *Koster*, the fact that DiRienzo and the other named plaintiffs in the proposed class have a substantial financial stake in the action is of no importance in determining whether their forum choice is entitled to a strong presumption. Unsurprisingly, the majority fails to quote in full the relevant passage from *Koster*; in the parlance of securities law, this is a material omission.

D. The PSLRA Also is Irrelevant in this Context

The majority's crabbed reading of *Koster* rests not only on its misreading of that case, but also on its erroneous conclusion that *Koster* is less relevant to securities fraud class actions in light of the enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. §§ 77k, 771, 77z-1, 77z-2, 78a, 78j-1, 78t, 78u, 78u-4, 78u-5). Under that statute, the "most adequate" lead plaintiff in a securities fraud class action is presumed to be the suing party with "the largest financial interest in the relief sought by the class." 15 U.S.C. § 77z-l(a)(3)(B)(iii). Relying on this recent reform, the majority suggests that the lead plaintiffs in *DiRienzo* had the right to litigate at home. However, the PSLRA does not vest in any plaintiff a greater right to litigate at home than any other plaintiff rather, it merely identifies the plaintiff who is presumed to be the best *class representative.* Accordingly, the PSLRA does not change the fact that *all* (domestic) securities fraud class members could (as in *Koster*) "with equal show of right go into their many home courts" and assert their claims.[6] Thus, the PSLRA does not displace *Kos-*

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[6] The instant actions provide a prime example of how the PSLRA has no effect on the right to bring suit, in that the *Liff* plaintiffs are proceeding with direct claims for securities fraud, and there is no indication that they are somehow "less equal" to proceed than the lead plaintiffs in *DiRienzo.*

ter, and it did not compel Judge Mukasey to keep *DiRienzo* in the Southern District of New York.[7]

E. Koster Applies Without Regard to the Location of the Alternative Forum

The majority's conclusion that *Koster* is inapposite because the alternative forum in the instant case is foreign and the proposed class is largely made up of American investors lacks any discernible basis in *Koster* or its progeny; indeed, the majority does not trouble to try to identify language in *Koster* to support its novel stance. As it happens, *Koster* did emphasize that courts generally must respect a plaintiff's interest in convenience, as reflected by his choice of a particular forum, but that a plaintiffs choice (logically) is entitled to less weight when the plaintiff class is dispersed across the nation. *See Koster*, 330 U.S. at 524. The reasoning in *Koster* on this point does not depend in any way on the location of the particular alternative forum.

Rather than rely on the Supreme Court's decision in *Koster*, the majority looks instead to our recent decisions in *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000) and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), two cases that did *not* involve representative plaintiffs proceeding on behalf of larger classes, for support of the inventive, and surprising, proposition that "the 'home forum' of an American citizen for *forum non conveniens* purposes is any 'United States court.'" *Ante* at 62. In *Guidi*, we reversed a trial court's decision to dismiss on *forum non conveniens* grounds a wrongful death action

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[7] The only other case addressing the issue in a post-PSLRA setting found that "the strong presumption in favor of the plaintiffs choice of forum . . . is entitled to *less weight* where, as here, plaintiffs proceed in a representative capacity." *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 212 (S.D.N.Y. 1999) (citing *Koster*, 330 U.S. at 524) (internal quotation marks omitted) (emphasis added).

brought by the American survivor—and American relatives of the deceased victims—of a terrorist attack in Egypt. *See id.* at 143. Even a cursory reading of *Guidi* makes clear that the case is limited to its highly unusual facts, as we explicitly stated: "*In this case*, Plaintiffs argue—and we agree—that their 'home forum' as American citizens is a United States court." *Id.* at 146 (emphasis added); *see also id.* at 147 n.4 (explaining that "the states where Plaintiffs reside are not relevant to the *forum non conveniens* analysis *in this case.*" (emphasis added)). At every stage *of Guidi*, we noted the extremely unusual context of the case, with the alternative forum being Egypt, the very country in which the gruesome terrorist acts underlying the matter had occurred. We explained:

> In the balancing of conveniences, we believe that the *substantial and unusual emotional burden* on Plaintiffs if they were required to travel to Egypt provides additional support for keeping the case in their chosen forum of New York.
>
> Plaintiffs are *atypical* in that they are either the widows or victim of a murderous act directed specifically against foreigners. Understandably, they are strongly adverse to litigating in a country where foreigners have been the target of hostile attacks, and have concerns for their own safety if required to travel there to bring their suit. Plaintiffs have supplied us with ample evidence of terrorist attacks occurring after the events giving rise to their action . . . which give credence to Plaintiffs' uncertainty as to the safety of American visitors to Egypt insofar as fear of religious extremism is concerned.
>
> In its *forum non conveniens* analysis, the district court did not mention, much less give any weight to, the emotional burden faced by Plaintiffs if the case were to be heard in Egypt . . . . We believe

> that justice is best served *in this case* by acknowledging the *unique and heavy burden* placed on Plaintiffs if they are required to litigate in Egypt. In balancing the interests at stake for purposes of *forum non conveniens*, the district court should have taken into account the *unusual circumstances* of Plaintiffs that weigh strongly in favor of the New York forum.

Id. at 147 (emphases added); *see also id.* at 144 (noting plaintiffs' claim that they "were emotionally unable to travel to Egypt for a trial"); *id.* at 145 ("the special circumstances presented by this case—specifically, the emotional burden on Plaintiffs of returning to the country where they or their loved ones were shot in an act of religious terrorism—provide additional weight for favoring" plaintiffs' forum choice); *id.* at 147 (explaining that plaintiffs "are ordinary American citizens for whom litigating in Egypt presents an obvious and significant inconvenience, especially considering their adverse experience with that country to date").

Guidi is not weighed down with these qualifications because the panel was unsure of its decision, but rather because *Guidi* was in fact an "atypical" case. In most *forum non conveniens* cases, a court is called upon to balance logistical inconveniences—how far the parties must travel, where the evidence and witnesses are located, and so on. In such cases, it makes sense to characterize a particular *state* as a (domestic) plaintiffs home forum; Maine, for instance, is closer to Canada than Hawaii, and when the concern is logistical inconvenience, it defies common sense to treat Maine and Hawaii as the same. In *Guidi*, however, the relevant inconvenience was not logistical, but psychological—the "emotional burden" of traveling to Egypt would have been difficult, and perhaps impossible, for the *Guidi* plaintiffs to bear. In that "unique" circumstance, it made sense to treat plaintiffs' home forum as the United States. The distance between

plaintiffs' residences and downtown Manhattan was immaterial; what mattered was that neither place was in Egypt.

The instant case is hardly "atypical" in this way, and the asserted burdens of litigating this securities action in Canada are logistical, not emotional. Accordingly, there is no room in this case—or, indeed, in the mainstream of *forum non conveniens* law—for the *Guidi* panel's notion that the United States as a whole can be characterized as the home forum of all domestic plaintiffs. Moreover, even if *Guidi* were nominally applicable, it would be inapposite. The location of a plaintiffs home forum has no obvious bearing on the presumptive weight that should be accorded to his forum choice, and the majority has not identified any legitimate reason *why* the distinction between an alternative domestic forum and an alternative foreign forum should matter in determining, in the typical case, whether a plaintiff is entitled to the usual strong presumption in favor of his choice of forum.

The majority also suggests that *Wiwa*, 226 F.3d 88, dictates that Judge Mukasey should have retained jurisdiction in the instant case. *Wiwa*, like *Guidi*, was an atypical case involving the extraordinary situation of Nigerian emigres seeking redress under the Torture Victim Prevention Act, 28 U.S.C. § 1350 App., for the torture they suffered in Nigeria. The majority misreads *Wiwa* when it suggests that *Wiwa* creates a rule that when half or more of the plaintiffs to a lawsuit are residents of the United States the district court must retain jurisdiction in the face of a motion to dismiss for *forum non conveniens*, *see ante* at 64. In *Wiwa* we were perfectly clear that the case does not alter the traditional *Gilbert* factors and plainly "do[es] not reflect a rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*." *Wiwa*, 226 F.3d at 102. We simply reiterated that "a plaintiffs lawful U.S. residence *can* be a meaningful factor supporting the plaintiffs choice of a U.S. forum," and that it is one factor that a district court

should consider in deciding whether to dismiss a case on *forum non conveniens* grounds. *Id.*

Although in *Wiwa* we held that the district court erred in failing to count in favor of the plaintiffs' choice of forum that "two of them were residents of the United States," *id.* at 103, we also stated clearly that the key question underlying the relevance of that factor is whether a dismissal for *forum non conveniens* "would cause plaintiff significant hardship." *Id.* In the instant case, Judge Mukasey explicitly enumerated and considered plaintiffs' claims that this dispute is connected to the United States and, thus, should be litigated in an American forum. *See DiRienzo*, 49 F. Supp. 2d at 641.

After reviewing plaintiffs' claims, Judge Mukasey noted that, from plaintiffs' perspective, some of the connections between the dispute and the United States "will make litigating in Ontario less convenient." *Id.* Judge Mukasey's analysis makes clear that he considered the burden that moving the litigation to Canada would place on plaintiffs, and that he concluded that something short of "significant hardship"—some mere inconvenience—would result.

The majority's conclusion—that, in a typical case, *any* court of the United States can serve as an American plaintiffs "home forum"—will unduly restrict the broad discretion of a district court that we have understood to exist in these situations. It is clear that *forum non conveniens* was employed in the past "to force transfer of a case domestically from one state or district to another."[8] *Howe*, 946 F.2d at 947. For

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[8] In 1948, Congress enacted 28 U.S.C. § 1404(a), pursuant to which a court can direct a change of venue from one domestic court to another in the interest of convenience. We have explained that § 1404(a) "codifies a part of the district court's inherent power." *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 156 (2d Cir. 1980) (*en banc*) (internal quotation marks omitted). Accordingly, in purely domestic cases, courts no longer dismiss on *forum non conveniens* grounds; instead, courts utilize their statutory authority to transfer venue.

instance, in both *Koster* and its companion case, *Gilbert*—which we have long recognized as the "leading authority on *forum non conveniens*," *Alcoa*, 654 F.2d at 150—the Supreme Court affirmed *forum non conveniens* dismissals in favor of other domestic venues.[9] It is therefore clear beyond doubt that the "leading authority on *forum non conveniens*" did not understand all domestic venues to be created equal, with each of them, or any of them, able to function as the home forum for an American plaintiff.

Following the enactment of § 1404(a), courts only look to the federal common law of *forum non conveniens* in cases involving foreign alternative fora. If *Koster* is applied improperly—that is, as it is applied by the majority here—the effect of the majority's conclusion that *any* court of the United States serves as the home forum for a proposed plaintiff class comprised in part of Americans will be quite straightforward: It will prevent district courts from applying the law of *forum non conveniens* except in cases where the plaintiffs themselves are largely foreign.

This newly-contrived, and unnecessary, restriction on the discretion of district courts is at odds with the historical understanding of the idea of a "home forum." In the context

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[9] Specifically, *in Gilbert*, the Court affirmed the *forum non conveniens* dismissal of "an action commenced in the Southern District of New York by a Virginia plaintiff against a Pennsylvania corporation to recover damages caused by a fire in a warehouse in Lynchburg, Virginia." *Gilbert*, 330 U.S. at 509. In doing so, the Court made it clear that New York was not the home forum of the Virginia plaintiff. *See id.* Similarly, in the companion case of *Koster*, the Court affirmed the *forum non conveniens* dismissal of an action brought in New York against Illinois defendants on behalf of a nationwide class. Had New York served as a home forum for the entire class, rather than just the lead plaintiff, presumably Mr. Koster would have been entitled to a strong presumption in favor of his choice of forum; instead, the Court denied him the benefit of the strong presumption and held that the action was more properly brought in Illinois.

of both venue, *see generally* 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3802 (1986) (detailing the history of venue provisions, including the early requirement that suit be brought "in the *district of residence* of either the plaintiff or the defendant" (emphasis added)), and personal jurisdiction, *see, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 470-78 (1985) (Florida not the home forum of Michigan resident), a party's home forum has always been tied to the district or state in which he resides. This concept is reflected in our own *forum non conveniens* jurisprudence, as we have explained that the "general rule under [*Gilbert*] requires a court to defer to a plaintiffs choice of forum unless the *forum non conveniens* factors strongly favor dismissal, *especially where the plaintiff resides in the forum state.*" *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 510 (2d Cir. 1998) (emphasis added) (citation omitted); *see also Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091-92 (9th Cir. 1998) (concluding that a California plaintiff was not entitled to a strong presumption in favor of its choice of Hawaii as the forum because Hawaii was not the home forum); *but see Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) (reaching the opposite conclusion). Put another way, we stated in *Evolution Online* that a plaintiffs forum choice is entitled to *more* weight when he resides in the forum state, and conversely is entitled to *less* weight when he resides outside the forum state. The majority offers no comment or explanation for its abandonment of this commonsense conclusion, which is rooted in the generally accepted understanding that a party's home forum is the state or district in which it resides.

Finally, even if the majority's narrow interpretation of *Koster* arguably might have some force in a case where none of the plaintiffs resided in the alternative forum (here, Canada), in the instant case plaintiffs propose to represent "all purchasers" of Philip stock during the relevant period, and it is not disputed that a significant percentage of the proposed

class is Canadian.[10] The fact that a significant percentage of the proposed class is situated outside the United States further bolsters Judge Mukasey's reasonable and modest conclusion that plaintiffs' choice of the Southern District of New York as the forum for the *DiRienzo* representative action is entitled to "less weight" than a plaintiffs choice of forum normally would receive in a direct action. Although the majority claims that plaintiffs want this case tried in New York 'not simply because they prefer that location, but because of the substantive benefits they perceive would ensue from trying this case in the United States," *ante* at 62, we have stated clearly that 'the difference in applicable substantive law is properly considered when assessing whether an adequate alternative forum exists," *see Alfadda*, 159 F.3d at 46, not whether the forum choice is entitled to a strong presumption.[11]

In conclusion, the majority's opinion—that any court of the United States can serve as the home forum in any case involving American plaintiffs—appears to rest on a blunt and reflexive preference for American courts and American plaintiffs above all others. Of course, whatever the merit—if any—of this novel stance, which dramatically departs from the federal common law of *forum non conveniens* as we have

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[10] As noted above, of the $380 million raised by Philip in a November 1997 secondary offering, approximately $94 million was derived from sales by Canadian underwriters to investors outside the United States.

[11] We have explained: "That the law of the foreign forum differs from American law 'should ordinarily not be given conclusive or even substantial weight' in assessing the adequacy of the forum." *Alfadda*, 159 F.3d at 46 (quoting *Piper Aircraft*, 454 U.S. at 247). Accordingly, the majority's concern over "the applicable rules of law" is largely irrelevant even with regard to the adequacy of the alternative forum, and certainly should play no role in determining whether plaintiffs' forum choice should be afforded substantial deference.

known it, this preference properly should be articulated in the first instance by the Supreme Court.

For these reasons, I believe that Judge Mukasey properly exercised his conceded discretion in concluding that the *DiRienzo* plaintiffs' choice of forum in a representative suit is entitled to "less weight" than if they had chosen to file an action only on their own behalf

III. The *Liff* Action

The *Liff* action arises out of many of the same facts alleged in *DiRienzo*. In August 1998, the *Liff* plaintiffs filed suit in Tennessee, naming as defendants five of Philip's director-officers.[12] The *Liff* plaintiffs were stockholders in five corporations that Philip had purchased in exchange for a combination of cash and Philip stock. They claim that, in selling their companies to Philip, they relied on the veracity of statements in Philip's filings with the U.S. Securities and Exchange Commission concerning the company's financial performance, and that these statements turned out to be fraudulent. Each of the fourteen *Liff* plaintiffs asserts claims solely on his own behalf.

On February 3, 1999, the Judicial Panel on Multidistrict Litigation transferred *Liff* to the Southern District of New York for "coordinated or consolidated pretrial proceedings" with *DiRienzo*, which already was pending there. On May 26, 1999, the District Court issued a brief Order in *Liff* stating that "[for the reasons set forth in this Court's May 4, 1999 opinion and order in [*DiRienzo*] the above-captioned case is dismissed." On June 24, 1999, the Court denied the *Liff* plaintiffs' motion to amend the judgment pursuant to Fed. R. Civ. P. 59, noting that its May 4 Opinion "dismissed all actions herein, including *Liff*."

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[12] Each of the *Liff* defendants, save Peter Chodos, also is a defendant in *DiRienzo*.

In dismissing *Liff* the District Court relied solely on the "reasons set forth in" its May 4 Opinion. However, the reasons for granting the motion to dismiss *DiRienzo*, as expressed in the May 4 Opinion, are not entirely applicable to *Liff*. Specifically, the District Court noted in *DiRienzo* that it was placing "less weight" on plaintiffs' choice of forum because they were proceeding in a representative capacity. *DiRienzo*, 49 F. Supp. 2d at 634. While I believe this was a perfectly sound conclusion with respect to *DiRienzo*, it bears recalling that the *Liff* plaintiffs are not proceeding in a representative capacity. I believe the *Liff* plaintiffs, unlike the *DiRienzo* plaintiffs, are entitled to "a strong presumption in favor of [their] choice of forum." *Murray*, 81 F.3d at 290. In these circumstances, I would vacate and remand *Liff* in order to permit the District Court to reconsider whether it should exercise its discretion to dismiss *Liff* in favor of litigation in Ontario after affording the *Liff* plaintiffs the benefit of this presumption.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: PHILIP SERVICES CORPORATION SECURITIES LITIGATION	:	MDL 1230 (MBM) M-21-77
ROBERT W. HILLGER, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	98 Civ. 835 (MBM)
-against-	:	OPINION AND ORDER
PHILIP SERVICES CORPORATION, ALLEN FRACASSI, MARVIN BOUGHTON, and ROBERT WAXMAN,	:	
Defendants.	:	

MUKASEY, District Judge.

In this consolidated class action, plaintiffs sue Philip Services Corporation ("PSC"), several of its current and

former officers and directors, 17 underwriters (the "Underwriter Defendants") and Deloitte & Touche ("Deloitte"), alleging violations of several federal securities laws. Defendants move to dismiss plaintiffs' Consolidated and Amended Class Action Complaint (the "complaint") on *forum non conveniens* grounds. In addition, defendants Deloitte, William Haynes and Robert Knauss move to dismiss for failure to state a claim. For the reasons stated below, defendants' motion to dismiss on *forum non conveniens* grounds is granted, and plaintiffs' complaint is dismissed. In light of this outcome, the motions to dismiss for failure to state a claim will not be treated.

I.

The following facts are relevant to this motion. PSC, a Canadian corporation, is "an integrated resource recovery and industrial services company, which provides metal recovery and processing services, by-products recovery and industrial services to major industry sectors throughout North America." (Compl. ¶ 48) The company's principal executive offices are in Ontario, Canada; its U.S. corporate headquarters are in Pittsburgh, Pennsylvania. (*Id.*) PSC's stock is traded on the New York Stock Exchange ("NYSE"), the Toronto Stock Exchange and the Montreal Stock Exchange, and, prior to April 30, 1996, was traded also on the NASDAQ market. (*Id.*)

Between 1992 and 1997, PSC sought to expand its revenue base, its range of services and its network of facilities throughout North America. (*Id.* ¶ 164) To the extent relevant here, this expansion effort took two forms. First, in 1997, PSC acquired two companies—Allwaste, Inc. ("Allwaste") and Serv-Tech, Inc. ("Serv-Tech")—in stock-for-stock deals worth a total of approximately $560 million. (*Id.* ¶ 165) Second, in November 1997, PSC completed two secondary public offerings, which together raised approximately $380 million. (*Id.* ¶¶ 1-2) One offering, which raised approximately $284 million, was made exclusively to U.S. in-

vestors, and was underwritten by 17 American securities firms, the Underwriter Defendants. (Selinger Aff. ¶¶ 6-11) The other offering, which raised approximately $94 million, was made only to investors outside the United States, and was underwritten by eight Canadian securities firms (the "Canadian Underwriters"). (*Id.* ¶¶ 8-10) In connection with the acquisitions of Allwaste and Serv-Tech and the U.S. public offering, PSC filed registration statements with the Securities and Exchange Commission ("SEC"). (Compl. ¶ 1)

On January 26, 1998, PSC announced that it would take "charges to earnings" for fiscal year 1997 of between $250 and $275 million. (*Id.* ¶¶ 7, 346) Over the next several months, this figure was raised to over $381 million, of which $125 million was reported to arise from overstated copper inventory and unrecorded copper-trading losses. (*Id.* ¶¶ 6-7, 9-11, 130, 346) In addition, PSC issued revised financial statements for fiscal years 1995, 1996 and 1997. (*Id.* ¶¶ 353, 357, 359) The revised statements disclosed that 1995 earnings had been overstated by approximately $22.5 million, or 690%, and that 1996 earnings had been overstated by $48.3 million. (*Id.* ¶¶ 3, 319) Thus, instead of posting a $28.4 million gain in 1996, as PSC had initially reported, the company recorded losses totaling approximately $20 million. (*Id.* ¶ 3) Due at least in part to these announcements, the share price of PSC stock dropped from 13^{1/8}$ on January 16, 1998 to 2^{9/16}$ in July 1998, a loss of approximately 80%. (*Id.* ¶ 13)

Unsurprisingly, PSC's announcements and the drop in its share price loosed a torrent of litigation. In Ontario, Joseph Menegon filed a class action (the "Menegon Class Action") on behalf of himself and all other "persons in Canada who held and/or purchased common shares of [PSC] between February 28, 1996 and April 23, 1998" against PSC, Deloitte and the Canadian Underwriters. (Serb Decl. ¶ 5 & Ex. D, ¶ 1) Additionally, PSC itself filed a lawsuit in Ontario against, *inter alia*, Robert Waxman—the former Presi-

dent of PSC's Metals Recovery Group and one of the defendants here—and Greg Madesker and Rik Barrese, metals traders who worked under Waxman, alleging that they perpetrated fraud at PSC. (Serio Decl. ¶ 6 & Ex. E)

In the United States, more than 20 class action lawsuits were commenced, in various jurisdictions, against some combination of the defendants here. These actions were transferred to this court by the Judicial Panel on Multidistrict Litigation and consolidated for pre-trial purposes. Thereafter, plaintiffs filed an amended complaint, alleging violations of (1) sections 10(b) and 20 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78t; (2) SEC Rule 10b-5, 17 C.F.R. § 240.10b-5; and (3) sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77k, 771(a)(2), 77o. (Compl. ¶ 15) Specifically, plaintiffs charge PSC with making materially false and misleading statements concerning its publicly reported revenues, earnings, assets and liabilities. (*Id.* ¶ 2) In addition, they seek to hold Deloitte liable in connection with its audits of PSC in 1995, 1996 and 1997 (*id.* ¶¶ 277-336), and to hold the Underwriter Defendants liable in connection with the November 1997 public offering. (*Id.* ¶¶ 337-45) Deloitte is a partnership organized under the laws of Ontario, and all its partners are Canadian citizens. (Matz Decl. ¶ 2) The 17 Underwriter Defendants are based in the United States, although seven of the firms conduct business in Canada also. (Selinger Aff. ¶¶ 9, 12 & n.1)

II.

The doctrine of *forum non conveniens* permits a court to decline jurisdiction on the ground that adjudication in a foreign forum is more appropriate and convenient. The *forum non conveniens* analysis proceeds in two steps. First, the court must determine whether an "adequate alternative forum" exists for litigation of the plaintiffs claims. *Alfadda v. Penn*, 159 F.3d 41, 45 (2d Cir. 1998) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)). Second, as-

suming there is such a forum, the court must weigh the public and private interest factors identified by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947), to determine which forum "will be most convenient and will best serve the ends of justice." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996).

In making this inquiry, "[t]here is ordinarily a strong presumption in favor of the plaintiffs choice of forum." *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996) (citations omitted); *accord Piper*, 454 U.S. at 255. Thus, "dismissal usually is not appropriate unless 'the balance of convenience tilts strongly in favor of trial in the foreign forum.'" *Alfadda*, 159 F.3d at 46 (quoting *R. Maganlal & Co. v. M. G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991)); *accord Capital Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998), *cert. denied*, No. 98-1308, 119 S. Ct. 1459 (Apr. 19, 1999). Nevertheless, where, as here, plaintiffs proceed in a representative capacity, their choice of forum is entitled to less weight. *See Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); *DeYoung v. Beddome*, 707 F. Supp. 132, 138 (S.D.N.Y. 1989) (citing *Koster*, 330 U.S. at 523-27); *see also Shulof v. Westinghouse Elec. Corp.*, 402 F. Supp. 1262, 1263 (S.D.N.Y. 1975) ("While it is axiomatic that a plaintiffs choice of forum is entitled to great consideration, the adage has little weight in stockholder class actions . . . ." (citing *Koster*, 330 U.S. at 524)). Such plaintiffs "have only a small direct interest in a large controversy in which there are many potential plaintiffs, usually in many potential jurisdictions." *DeYoung*, 707 F. Supp. at 138. Moreover, the plaintiffs who actually sue "do not claim to be witnesses to anything other than their ownership of an interest in the dispute and their desire, and that of their lawyers, to represent others similarly situated." *Id.*

A. The Adequacy of Ontario as an Alternative Forum

As noted, the first step in the *forum non conveniens* inquiry is to determine whether there is an adequate alternative forum for litigation of plaintiffs' claims. An alternative forum is adequate if "(1) the defendants are subject to service of process there; and (2) the forum permits 'litigation of the subject matter of the dispute.'" *Alfadda*, 159 F.3d at 45 (quoting *Piper*, 454 U.S. at 254 n.22); *accord Capital Currency*, 155 F.3d at 609. That the law of the foreign forum "differs from American law 'should ordinarily not be given conclusive or even substantial weight' in assessing the adequacy of the forum." *Alfadda*, 159 F.3d at 45 (quoting *Piper*, 454 U.S. at 247). Nevertheless, in "rare circumstances," where the remedy offered by an alternative forum "is so clearly inadequate or unsatisfactory that it is no remedy at all," an unfavorable change in law that would result from suing in the alternative forum "may be given substantial weight." *Piper*, 454 U.S. at 254 & n.22.

Defendants contend that Ontario, Canada is an adequate alternative forum. In response, plaintiffs argue that Ontario is inadequate because: (1) there is "substantial uncertainty" whether an Ontario court would exercise jurisdiction over all the Underwriter Defendants (Pl. Mem. at 14-15);[1] (2) Ontario would not recognize plaintiffs' claims against the Underwriter Defendants, which are based on a public offering within the United States to American investors (*see id.* at 15-16); (3) Ontario law "may" preclude plaintiffs from asserting "*any* claims for damages" against Deloitte, as PSC's auditor (*id.* at 16); and (4) Ontario lacks an "effective comparable class action remedy" for defrauded investors. (*Id.* at 2, 16-18) I will discuss each of plaintiffs' objections in turn.

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[1] "Pl. Mem." refers to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss on the Grounds of *Forum Non Conveniens*, dated December 9, 1998.

Plaintiffs' first objection, that Ontario courts might not exercise jurisdiction over the Underwriter Defendants, is easily rejected. In joining the present motions to dismiss, the Underwriter Defendants have explicitly consented to Canadian jurisdiction. (*See* 12/23/98 Letter Br. from Brad S. Karp at 3) Thus, to the extent that plaintiffs' objection is premised on the assumption that Canadian courts would not have personal jurisdiction over the Underwriter Defendants, that objection is moot. *See PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74-75 (2d Cir. 1998); *cf. R. Maganlal & Co.*, 942 F.2d at 167 (stating that dismissal on *forum non conveniens* grounds can be conditioned on a defendant's consent to jurisdiction in the foreign forum); *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 203-04 (2d Cir. 1987) (same).

Nevertheless, plaintiffs appear to argue also that Ontario courts might choose to abstain from exercising their jurisdiction over the Underwriter Defendants, on *forum non conveniens* grounds. (*See* Jack Decl. ¶¶ 9-10; 12/31/98 Letter Br. from Neil L. Selinger & Jeffrey C. Block at 2) However, in the event that this action is dismissed and a similar lawsuit is commenced in Ontario, neither plaintiffs nor defendants are likely to move—or to be in a position to move—the Ontario court to dismiss the new action on *forum non conveniens* grounds. (*See* La Forest Decl. ¶¶ 5-6) Moreover, even assuming the issue could be raised, it is hard to imagine that an Ontario court would dismiss the action in deference to the United States knowing that a U.S. District Court had already ruled that Ontario was the more appropriate and convenient forum. *Cf. Schertenleib v. Traum*, 589 F.2d 1156, 1163 (2d Cir. 1978) (stating that the "unlikely possibility that the plaintiff may ultimately have to return to the inconvenient forum is a factor to be weighed in deciding whether to dismiss, but this kind of improbability should not automatically preclude the use of forum non conveniens").

Next, plaintiffs argue that they might be precluded from bringing statutory claims against the Underwriter Defendants in Ontario because there is no equivalent under Ontario statutory law to sections 11 and 12(a)(2) of the Securities Act. This objection is without merit, for two reasons. First, contrary to plaintiffs' assertion, there is an Ontario statute analogous to sections 11 and 12(a)(2) of the Securities Act. As defendants note, section 130 of the Ontario Securities Act, R.S.O. 1990 c.S.5,[2] establishes a statutory remedy for investors who purchase securities in a public offering where the prospectus contains a material misrepresentation.[3] (*See* Reuter Decl. ¶ 7) In addition, as even plaintiffs' expert in Canadian law acknowledges, plaintiffs would have several common law causes of action against the Underwriter Defendants in an action brought in Ontario. (*See* Jack Decl. ¶¶ 21-22) To be sure, it is not apparent from the record whether section 130 of the Ontario Securities Act and the Canadian common law causes of action apply to public offerings outside Canada. Notably, however, plaintiffs have failed to submit any authority holding that they do not.

In any event, whether section 130 of the Ontario Securities Act and Canadian common law would apply to plaintiffs' claims against the Underwriter Defendants appears to be irrelevant. As plaintiffs' expert acknowledges, an Ontario court "would in all likelihood be required to apply U.S. laws" to claims "against U.S. defendants in respect of American residents who purchased PSC securities [in the United States] under U.S. securities laws." (Jack Decl. ¶ 11; *see also* La Forest Decl. ¶ 16) Thus, an Ontario court would

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[2] The Ontario provision is attached as Exhibit A to Deloitte's Reply Memorandum of Law in Further Support of Its Motion to Dismiss, dated December 23, 1998.

[3] Indeed, in the Menegon Class Action, currently pending in Ontario, plaintiffs assert claims against the Canadian Underwriters under section 130 of the Ontario Securities Act. (*See* Serio Decl. Ex. D)

probably apply sections 11 and 12(a)(2) of the Securities Act to plaintiffs' claims against the Underwriter Defendants, leaving plaintiffs in the same position they were in here. That an Ontario court could be called upon to apply U.S. law might weigh in favor of maintaining the present action in the United States—an issue discussed further below—but the availability of a remedy under sections 11 and 12(a)(2) undermines plaintiffs' argument that Ontario is an inadequate forum with respect to their claims against the Underwriter Defendants. *Cf. Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (Breyer, C.J.) (concluding that Canada is an adequate alternative forum for a shareholder lawsuit in part because "Canadian courts will either apply American law or they will apply Canadian laws that offer shareholders somewhat similar protections by forbidding misrepresentation and fraud and imposing fiduciary obligations" (citations omitted)).

Plaintiffs' third objection to Ontario is that they "may" be precluded from asserting claims for damages against Deloitte. In support of their motions to dismiss, defendants submit a declaration from Robert Reuter, an expert in Canadian law, discussing several claims that plaintiffs could assert in Ontario, including conspiracy, fraud or deceit, negligent misrepresentation, fraudulent misrepresentation and derivative claims. (*See* Reuter Decl. ¶¶ 7-13) In response, plaintiffs' expert questions the adequacy of only one of these potential claims, arguing that Canadian law does not permit shareholders to bring a claim for negligent misrepresentation against auditors based on damages to share value. (*See* Jack Decl. ¶ 26) By their silence, plaintiffs concede that the other claims discussed by Reuter are available against Deloitte, and thus that they are not without a "remedy at all." *Piper*, 454 U.S. at 254.

To be sure, litigating this case in Ontario might prevent plaintiffs from availing themselves of some benefits of U.S. securities laws. *Forum non conveniens* dismissal, however,

"is not trumped simply because the foreign forum will apply different substantive law than an American court." *Capital Currency*, 155 F.3d at 609-10. Indeed, "[t]he availability of an adequate alternate forum does not depend on the existence of the identical cause of action in the other forum." *PT United Can*, 138 F.3d at 74. A foreign forum is adequate even if the remedies available in that forum are only "roughly analogous" to those available in the United States, *Capital Currency*, 155 F.3d at 610, or if the foreign remedies "adequately address the underlying controversy expressed in [the] plaintiffs complaint." *PT United Can*, 138 F.3d at 74; *cf. Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 129-30 (2d Cir. 1987) (per curiam) (holding that dismissal was proper notwithstanding that the plaintiff could not bring a RICO claim in the alternative forum because a fraud claim provided an adequate substitute); *Lana Int'l Ltd. v. Boeing Co.*, No. 93 Civ. 7169(LLS), 1995 WL 144152, at *2 (S.D.N.Y. Mar. 30, 1995) (holding that several common law claims provided an adequate substitute for the plaintiffs claim under the Lanham Act, which was "not cognizable in Canadian courts").

Plaintiffs' final objection to Ontario, that the forum lacks an "effective comparable class action remedy" for defrauded investors, is more weighty than the other three. The objection arises from an interaction between substantive and procedural law. Ontario, it appears, does not recognize the so-called fraud-on-the-market theory accepted by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). (*See* Reuter Decl. ¶ 10(iv); Jack Decl. ¶¶ 23-24; Brown Decl. Ex. A) Under that theory, purchasers are not required to prove specific reliance on false information in order to establish a claim under section 10(b) of the Exchange Act or SEC Rule 10b-5. Instead, it is assumed that the purchasers relied on the accuracy of the stock price and that the price reflected all available information in the market. *See Basic*, 485 U.S. at 247. Without recognition of this theory, plaintiffs argue, "individual issues of reliance raise significant obstacles to

certification of a class under [Ontario] law." (Pl. Mem. at 16; *see also* Jack Decl. ¶ 25)

In support of their argument, plaintiffs cite *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003 (D.N.J. 1996), and *Trafton v. Deacon Barclays de Zoete Wedd Ltd.*, No. C 93-2758-FMS, 1994 WL 746199 (N.D. Cal. Oct. 21, 1994), both of which held, on precisely the ground urged by plaintiffs, that Ontario was not an adequate alternative forum for litigation of a securities class action under section 10(b) of the Exchange Act and Rule 10b-5. As the *Trafton* Court reasoned:

> While . . . Ontario courts have class action procedures, in the context of a claim for secondary market securities fraud, this device is virtually meaningless without having fraud-on-the-market substitute for actual reliance. It is hard to see how the plaintiff class can obtain class certification, much less ultimate relief, under these circumstances.

Trafton, 1994 WL 746199, at *12; *accord Derensis*, 930 F. Supp. at 1008 (citing *Trafton*, 1994 WL 746199, at *12).

Derensis and *Trafton* appear to be the only cases directly on point. Nevertheless, neither case is controlling on this court, and I find their conclusions unpersuasive. Most significantly, both courts ignored a crucial distinction between U.S. and Ontario class action certification requirements. In the United States, to certify a class action pursuant to Rule 23(b)(3)—the conventional basis for a securities fraud class action—it is necessary to demonstrate, *inter alia*, that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *see, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (discussing Rule 23(b)(3)). In Ontario, by contrast, a plaintiff need not show that common issues predominate to obtain class certification. (*See* La Forest Decl. ¶¶ 12-13) So long as the class members' claims or defenses "raise common issues" and a

"class proceeding would be the preferable procedure for resolution of common issues," certification is appropriate under Ontario law. *Derensis*, 930 F. Supp. at 1007-08 (quoting the Ontario Class Proceedings Act § 5(1), which establishes the requirements for class certification).

This distinction is significant. The so-called predominance requirement of Rule 23(b)(3) was a major reason why U.S. courts adopted the fraud-on-the-market theory in the first place. *See Basic*, 485 U.S. at 242 ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones."); *see also, e.g.*, Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. Rev. 435, 439-40 (1984), *cited in Basic*, 485 U.S. at 247 n.26; R. Douglas Martin, Note, *Basic Inc. v. Levinson: The Supreme Court's Analysis of Fraud on the Market and Its Impact on the Reliance Requirement of SEC Rule 10b-5*, 78 Ky. L.J. 403, 432 (1989/1990). Correspondingly, the absence of a predominance requirement in Ontario law is a major reason why Ontario courts have rejected the fraud-on- the-market theory. *See, e.g., Carom v. Bre-X Minerals Ltd.*, No. 97-GD-39574 *et al.*, 1998 ACWSJ LEXIS 49572, at *28-29 (Ontario Ct., Gen. Div. Nov. 4, 1998) ("[C]entral to the development of the [fraud-on-the-market] theory's presumption of reliance aspect in the United States is the requirement of a predominance of common issues for class action certification . . . . In comparison, the predominance of common issues requirement has not been incorporated [into Ontario law]."), *attached as* Exhibit A to the Declaration of James W. Brown. Thus, the premise underlying the *Trafton* and *Derensis* Courts' analyses—that the class action device is "virtually meaningless" in the absence of the fraud-on-the-market theory—is false. Even assuming *arguendo*, therefore, that an inability to obtain class certification in Ontario would be

relevant and material, the absence of the fraud-on-the-market theory does not render that forum inadequate. If anything, in fact, it looks easier to get class certification under Ontario law than under U.S. law.[4] *See also Union Carbide*, 809 F.2d at 199 (affirming *forum non conveniens* dismissal of a class action lawsuit based on the Bhopal plant disaster, notwithstanding the "absence in India of a class action procedure comparable to that in federal courts here").

Perhaps recognizing this fact, plaintiffs press two additional reasons why Ontario's class action procedures render Ontario inadequate. First, citing the recent passage of Ontario's class action statute in 1993, plaintiffs contend that Ontario is "in the relatively early stages of developing and applying the principles governing class actions, particularly in the realm of securities litigation," and that few securities class actions, if any, have "actually proceeded on through trial and appeal." (Jack Decl. ¶ 27; *see also* 12/31/98 Letter Br. from Neil L. Selinger & Jeffrey C. Block at 2) Second, plaintiffs contend that, even if class action certification could be obtained in Ontario, the requirement of proving individual reliance could be prohibitively expensive. (*See* Pl. Mem. at 18; 12/31/98 Letter Br. from Neil L. Selinger & Jeffrey C. Block at 1-2) These arguments are without merit.

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[4] Moreover, even if Ontario did have a predominance requirement, it would not necessarily follow that the forum would be inadequate for litigation of a securities class action. In the years before the Supreme Court adopted the fraud-on-the-market theory in *Basic*, several U.S. courts, including the Second Circuit, allowed shareholder suits to proceed as class actions, notwithstanding the requirement of proving individual reliance. *See, e.g., Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968); *see also Eisenberg v. Gagnon*, 766 F.2d 770, 785-86 (3d Cir. 1985) (citing cases). To the extent that plaintiffs had to prove individual reliance, these courts reasoned, "it would be more efficient to order separate trials, if necessary, limited to the issue of reliance." *Eisenberg*, 766 F.2d at 786.

First, that Ontario's class action statute is "untested," *Trafton*, 1994 WL 746199, at *12, is irrelevant to whether Ontario is an adequate forum for *forum non conveniens* purposes. Indeed, the Second Circuit considered and rejected just such an argument in *Capital Currency*, an antitrust case in which the plaintiffs had argued that England was an inadequate forum because no English court had "ever awarded money damages" in an antitrust suit. Relying on "considered *dicta*" from a case decided by the Law Lords of the House of Lords, the Court concluded that an English court could lawfully award damages, and held that this showing was sufficient. *Capital Currency*, 155 F.3d at 610. "[A]lthough English courts have not *yet* awarded damages in an antitrust case," the Court reasoned, "it appears that English courts have the power to do so." *Id.*

The circumstances of this case are not as stark as those in *Capital Currency*. Indeed, contrary to plaintiffs' representations, it appears that class actions, even in secondary market securities fraud cases, are becoming more common in Ontario. (*See* La Forest Decl. ¶¶ 7-8) Plaintiffs in *Carom v. Bre-X Minerals Ltd.*, for example, are proceeding as a class (*see* Brown Decl. Ex. A); in fact, plaintiffs' own expert is serving as part of the "plaintiffs' class action counsel team." (Jack Decl. ¶ 24 n.18) Moreover, there is a class action pending in connection with this very case. (*See* Serio Decl. Ex. D) Thus, it is plain that Ontario "permits 'litigation of the subject matter of the dispute,'" which is all that is required. *Capital Currency*, 155 F.3d at 609 (quoting *Piper*, 454 U.S. at 254 n.22).

Plaintiffs' final argument—that the unavailability of the fraud-on-the-market theory would make litigating in Ontario prohibitively expensive—is unfounded also. To begin with, it is hardly evident that the requirement of proving individual reliance would be especially expensive. For example, an Ontario court could proceed, as defendants suggest, by way of affidavits or post-verdict summary hearings (*see* PSC Par-

ties' Reply Mem. at 17), neither of which would be prohibitively expensive. More significantly, that it might be more expensive to proceed in Ontario is irrelevant to the inquiry into adequacy. *See, e.g.*, *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996) ("[S]ome inconvenience or the unavailability of beneficial litigation procedures similar to those available in federal district courts does not render an alternative forum inadequate." (internal quotation marks and citation omitted)); *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 515 & n.32 (S.D.N.Y. 1982) (Weinfeld, J.) ("Procedures in foreign courts need not be identical to U.S. procedures as long as the alternative forum is not 'wholly devoid of due process.'") (quoting *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 n.16 (2d Cir. 1980) (en banc)). It may be that such a cost is relevant to the private interest factor analysis discussed further below, *cf. Trafton*, 1994 WL 746199, at *13 (holding that the expense arising from "the fact that each class member would have to prove actual reliance" is a private interest factor weighing against dismissal), but it should not be a factor in assessing the adequacy of the foreign forum at the first step of the *forum non conveniens* analysis.

In short, because Ontario permits litigation of the subject matter of plaintiffs' complaint, I find that it is an adequate alternative forum. Plaintiffs' strenuous objections notwithstanding, this finding should not be surprising. With the exception of the *Trafton* and *Derensis* Courts, every court to consider whether Ontario is an adequate forum—including at least two in securities cases—has held that it is. *See, e.g.*, *Howe*, 946 F.2d at 950-52; *DeYoung*, 707 F. Supp. at 135-37; *see also Lana Int'l*, 1995 WL 144152, at *13 (finding Ontario adequate in a suit alleging, *inter alia*, violations of the Lanham Act, common law fraud, breach of warranty and breach of contract); *cf. John Labatt Ltd. v. Onex Corp.*, 890 F. Supp. 235, 241-42 (S.D.N.Y. 1995) (discussing the similarity between U.S. and Canadian securities laws). To be sure, there are, as these courts found, "small differences in

standards and procedural differences (such as greater difficulty in meeting class action requirements . . .)" between Ontario and U.S. law, but such differences are "beside the point." *Howe*, 946 F.2d at 952 (citing *Piper*, 454 U.S. at 254, 252 n.18); *see DeYoung*, 707 F. Supp. at 135-37.

B. Balancing the Gilbert Factors

Having found that Ontario provides an adequate alternative forum for this dispute, I must now weigh the private and public interest factors enumerated in *Gilbert*, and decide—paying proper deference to plaintiffs' choice of forum—whether the balance of convenience favors trial here or in Ontario. The private interest factors enumerated in *Gilbert* include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508. The public interest factors include:

> the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper, 454 U.S. at 241 n.6 (citing *Gilbert*, 330 U.S. at 509). Within the Second Circuit, it is well settled that a court "must 'adher[e] to the simple uniform standard of *Gilbert* in all instances.'" *Allstate Life Ins. Co. v. Linter Group Ltd.*,

994 F.2d 996, 1001 (2d Cir. 1993) (quoting *Alcoa S.S. Co.*, 654 F.2d at 153) (alteration in original).

1. The Private Interest Factors

In the present case, the private interest factors strongly favor litigation in Ontario. The gravamen of plaintiffs' complaint is that a Canadian company, with its directors, officers, underwriters and auditor, many of whom are Canadian, committed securities fraud by knowingly or recklessly overstating its copper inventory, overstating its earnings, understating its liabilities and failing to record known liabilities and inter-company transactions properly. (*See* Compl. ¶¶ 3-4) Most of these activities took place in Ontario. Thus, it is in Ontario that most of the key witnesses and the vast bulk of relevant evidence can be found.

First, and most significant, several important third-party witnesses are located in Canada who could be compelled to testify by an Ontario court, but not by an American court. These witnesses include, among others, Peter McQuillan, the former Comptroller of PSC's Scrap Metals Division, and Greg Madesker and Rik Barrese, former traders in PSC's Metals Recovery Division. The conduct of these parties is central to the allegations in plaintiffs' complaint, and their testimony will likely be crucial in resolving the dispute. (*See, e.g.*, Compl. ¶¶ 187, 202, 207-12, 214, 239-59, 332) Thus, the inability of a U.S. court to compel their live testimony supports *forum non conveniens* dismissal. *See, e.g.*, *Schertenleib*, 589 F.2d at 1165 (describing the inability to bring witnesses to the United States for "live cross-examination before a factfinder" as "[p]erhaps the most significant problem" justifying dismissal). Indeed, this factor takes on added importance here, because "fraud and subjective intent are elements of the claim, making the live testimony of witnesses for the purposes of presenting demeanor evidence essential to a fair trial." *Howe*, 946 F.2d at 952; *see Alfadda*, 159 F.3d at 48 ("The ability to secure witness testimony takes on added importance in this action because

'where, as here, appellants have alleged fraud, live testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor.'" (quoting *Allstate*, 994 F.2d at 1001)); *ACLI Int'l Commodity Servs. v. Banque Populaire Suisse*, 652 F. Supp. 1289, 1295 (S.D.N.Y. 1987) ("The compelling consideration in this case is the inability of the court or parties to guarantee the live testimony at trial in New York of those witnesses with uniquely first-hand knowledge of the fraud with which defendant BPS is charged .... No other private or public interest present in this case approaches this consideration in importance.").

Next, most, if not all, of the important defendants are located in Ontario: PSC is headquartered in Ontario (*see* Compl. ¶ 48); of the company directors and officers named as defendants, all but four—directors Felix Pardo, Norman Foster, William Haynes and Robert Knauss—live and work in Ontario (*see* Soule Decl. ¶¶ 4-5); and Deloitte is located in Ontario. (*See* Matz Decl. ¶ 2) The cost for these defendants and witnesses associated with these defendants to attend trial, therefore, will be substantially less if trial is held in Ontario. *See Alfadda*, 159 F.3d at 47 ("[T]he cost for witnesses to attend trial will be significantly lessened if trial is held in France because almost all the entities involved are based there."); *cf. Capital Currency*, 155 F.3d at 611; *Blanco*, 997 F.2d at 982; *Allstate*, 994 F.2d at 1001.

To be sure, as plaintiffs emphasize, the 17 Underwriter Defendants, Pardo, Foster, Haynes and Knauss are located in the United States. But it does not necessarily follow that many witnesses will be located in the United States. The Underwriter Defendants are named in only two of the 11 claims for relief asserted in plaintiffs' complaint, and their liability is entirely derivative of PSC's and the other Canadian defendants'. (*See* Compl. ¶¶ 2, 3, 84, 139, 338, 341-43, 387, 195) As for the four individual defendants who live in the United States, none of whom lives in New York (*see* Soule Decl. ¶ 5), defendants Haynes and Knauss became di-

rectors of PSC only in August 1997, as a result of PSC's acquisition of Allwaste, and are specifically named in only three paragraphs of the complaint. (*See* Compl. ¶¶ 60-61, 238) Thus, these defendants are less central to resolution of the dispute than the defendants located in Ontario.

Finally, just as most of the important defendants are located in Ontario, the vast bulk of the relevant documentary evidence is in Ontario. Deloitte conducted its 1995 and 1996 audits out of its Mississauga, Ontario office, and its papers relating to these audits are located in Ontario. (*See* Matz Decl. ¶¶ 3-4) Similarly, PSC's books and records are predominantly in Ontario, as are the company's documents relating to its copper inventory and the preparation of its financial statements and securities disclosures. (*See* Soule Decl. ¶ 7) Again, some relevant documents might be located in the United States—for instance, documents in the possession of the Underwriter Defendants, Allwaste or Serv-Tech—but these documents do not compare, in either quantity or importance, to those located in Ontario. Thus, this factor weighs also in favor of *forum non conveniens* dismissal. *See, e.g.*, *Alfadda*, 159 F.3d at 47; *Capital Currency*, 155 F.3d at 611; *Blanco*, 997 F.2d at 982; *Allstate*, 994 F.2d at 1001.

To overcome the compelling weight of these factors, plaintiffs cite various connections between this dispute and the United States. For instance, they note that PSC had its "primary base of operations" in the United States and that 70% of the company's revenue was generated here (*see* Selinger Decl. ¶ 2); that during the class period, PSC acquired several American companies, including Allwaste and Serv-Tech (*see id.* ¶ 3; *see also id.* ¶ 15); that many of PSC's major customers were large American corporations, including at least two which might be subject to third-party discovery (*see id.* ¶¶ 4, 16); that the larger of the two November 1997 public offerings was prepared in the United States, by American entities, and offered exclusively to American investors (*see id.* ¶¶ 6-13); that Deloitte is a "member" of a

"world-wide affiliation of firms" headquartered in New York (*see id.* ¶ 17(a)); and that members of Deloitte's Ontario office discussed the PSC audit with members of the New York office on at least one occasion. (*See id.* ¶ 17(b); *see also* Compl. ¶¶ 307-09) Several of these connections are, in fact, relevant to resolution of this dispute and, to that limited extent, will make litigating in Ontario less convenient. But, in general, plaintiffs' "attempt[ ] to morphose this case into a dispute that concerns the United States" is without merit. *Capital Currency*, 155 F.3d at 612. At bottom, this case is about fraudulent conduct and improper record-keeping by a Canadian firm in Canada, and it involves the United States only indirectly or secondarily.

2. The Public Interest Factors

Few of the public interest factors enunciated by the *Gilbert* Court favor either Ontario or the United States for litigation of this dispute. For instance, although docket congestion is a "persistent affliction" of this court, *DeYoung*, 707 F. Supp. at 139, there is evidence that Ontario courts are similarly afflicted. (*See* Jack Decl. ¶ 12) In addition, whereas an Ontario court would probably apply U.S. law to plaintiffs' claims under sections 11 and 12(a)(2) of the Securities Act (*see* Jack Decl. ¶ 11; *see also* La Forest Decl. ¶ 16), it is likely that an American court would have to apply Canadian law to the claims brought by class members residing outside the United States based on the purchase of PSC securities outside the United States. *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) ("[T]he anti-fraud provisions of the federal securities laws . . . [d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States *directly* caused such losses." (emphasis added)); *accord Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 127-29 (2d Cir. 1998) ("[A]ctivity in the United States that is 'merely preparatory' to a securities fraud elsewhere will not impli-

cate our antifraud laws."), *cert. denied*, 119 S. Ct. 1029 (1999); *see also Howe*, 946 F.2d at 953; *DeYoung*, 707 F. Supp. at 139.

Nevertheless, the "local interest in having localized controversies decided at home" weighs heavily in favor of litigation in Ontario. *Gilbert*, 330 U.S. at 509. It is well established that a country's "interest . . . in having controversies relating to one of its major corporations decided at home is substantial." *DeYoung*, 707 F. Supp. at 139; *see Alfadda*, 159 F.3d at 46; *Allstate*, 994 F.2d at 1002. As discussed above, this case predominantly concerns the conduct of a major Canadian corporation in Canada, notwithstanding the involvement of some American entities and persons. In addition, a class action lawsuit and an action brought by PSC itself are already pending in connection with this dispute in Ontario. Thus, it would be "highly intrusive" for an American court to involve itself in a matter that has already engaged the judicial authorities of Canada. *Id.* at 139.

Plaintiffs note that PSC stock traded heavily on American stock exchanges and that many of the company's shareholders are U.S. citizens. These facts without more, however, do not warrant significant consideration. Parties who choose to engage in international transactions, as plaintiffs did here, "'cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.'" *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 129 (S.D.N.Y. 1986) (quoting *Ionescu v. E.F. Hutton & Co. (France) S.A.*, 465 F. Supp. 139, 145 (S.D.N.Y. 1979)), *aff'd*, 812 F.2d 712 (2d Cir. 1987); *accord DeYoung*, 707 F. Supp. at 139; *see also Howe*, 946 F.2d at 953. Nor, for that matter, is the United States' interest in applying its laws to protect American investors and the integrity of American securities markets "overriding," as plaintiffs contend. (*See* Pl. Mem. at 27) Although this assertion finds some support in the case law, *see Al-*

fadda, 159 F.3d at 47 (citing cases); *see also Derensis*, 930 F. Supp. at 1011; *Trafton*, 1994 WL 746199, at *13, the Second Circuit has "never held that the United States' interest in applying its laws is a determinative factor to be considered in weighing convenience." *Capital Currency*, 155 F.3d at 611. To the contrary, the United States' interest in applying its own securities laws "is merely one consideration to be weighed in the totality of the *Gilbert* analysis." *Alfadda*, 159 F.3d at 47. Where, as here, the traditional *Gilbert* factors weigh heavily in favor of the foreign forum, and the foreign forum also has an interest in applying its own securities laws, this "one consideration" is far from overriding.

In sum, the balance of the *Gilbert* private and public interest factors strongly supports the conclusion that litigating this dispute in Ontario "will be most convenient and will best serve the ends of justice." *Peregrine Myanmar*, 89 F.3d at 46.

* * * * * *

For the foregoing reasons, defendants' motions to dismiss on *forum non conveniens* grounds are granted, and plaintiffs' complaint is dismissed.

SO ORDERED:

By prior opinion, familiarity with which is assumed, I dismissed plaintiffs' consolidated securities class action complaint on *forum non conveniens* grounds. Plaintiffs now move for reconsideration pursuant to Local Rule 6.3. Alternatively, plaintiffs move pursuant to Fed. R. Civ. P. 59(e) to alter or amend the order of dismissal to require waiver by each defendant of any statute of limitations defense. For the reasons stated below, plaintiffs' motion for reconsideration is denied, and plaintiffs' motion to amend is partially granted.

I.

Local Rule 6.3, which governs a motion for reconsideration, requires that such a motion set forth "concisely the mat-

ters or controlling decisions which counsel believes the court has overlooked." The purpose of Rule 6.3 is to "'ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters.'" *Carolco Pictures Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988) (citation omitted). Thus, reconsideration is appropriate "only where the court has 'overlooked controlling decisions or factual matters put before it on the underlying motion,' and which, had they been considered, 'might reasonably have altered the result reached by the court.'" *US. Energy Sys., Inc. v. Enviro Partners. L.P.*, No. 97 CIV. 1748(JFK), 1999 WL 294997, at *1 (S.D.N.Y. May 11, 1999) (citations omitted). The proponent of a reconsideration motion "is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings." *de los Santos v. Fingerson*, No. 97 CIV. 3972(MBM), 1998 WL 788781, at *1 (S.D.N.Y. Nov. 12, 1998).

In the present case, plaintiffs advance five arguments for reconsideration of my prior opinion, all directed at the finding that Ontario is an adequate alternative forum for litigation of the dispute. Four of these arguments—that the absence of the fraud-on-the-market theory in Ontario precludes relief for "thousands of U.S. investors"; that a decision of the Ontario Superior Court dated May 13, 1999 prevents certification of securities class actions; that Ontario law precludes relief for "in-and-out" traders; and that Canadian law will apply to all of plaintiffs' claims—were not raised by plaintiffs in their earlier papers, and accordingly could not have been "overlooked." Plaintiffs' last argument—that they are prevented by Canadian law from maintaining any claim for damages against defendant Deloitte & Touche—was considered and rejected in my prior opinion, *see Philip Servs.*, 1999 WL 304690, at *4-5, and plaintiffs have pointed to no controlling decision or factual matter that was "overlooked." None of these arguments would in any event change the out-

come of my prior opinion. Under the circumstances, however, to provide an explanation for why this is so would subvert the purposes underlying Rule 6.3.

II.

As noted, plaintiffs move in the alternative to amend or alter the order of dismissal to require that defendants waive any statute of limitations defense. Although plaintiffs did not raise this issue in their earlier papers, the Second Circuit has cautioned that dismissal on *forum non conveniens* grounds should be conditional where plaintiffs might be barred by a statute of limitations from bringing a new action in the alternative forum. *See, e.g.*, *Scottish Air Int'l. Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1235 (2d Cir. 1996); *Calavo Growers of Cal. v. Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980); *Schertenleib v. Traum*, 589 F.2d 1156, 1166 (2d Cir. 1978). Accordingly, amendment of the order of dismissal is warranted.

Nevertheless, a "less expansive waiver" than that urged by plaintiffs is "more appropriate" here. *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1133 (S.D.N.Y. 1992). Complete waiver by defendants of any statute of limitations defense would allow plaintiffs to benefit from any of their own delays in filing these actions in the United States as well as from delays after entry of the order of dismissal. Thus, dismissal will be conditioned on defendants' consenting to toll any applicable statute of limitations for the period that these consolidated actions were pending in the United States plus 30 days.[1] *Cf. Calavo Growers*, 632 F.2d at 968 (hold-

---

[1] This condition of dismissal is unlikely to become a point of contention because defendants, in fact, already have consented to the tolling of any statute of limitations for the period plaintiffs' actions were pending in the United States. (*See* Deloitte Mem. at 25; PSC Parties' Mem. at 13; 6/8/99 Letter from Brad S. Karp at 2) An additional 30 days is war-

[Footnote continued on next page]

ing that dismissal should have been conditioned upon an agreement by the defendants "to waive any statute of limitations defense that has arisen since the commencement of the action in the Southern District [of New York]"); *Schertenleib*, 589 F.2d at 1166 (requiring as a condition of dismissal that the defendant waive "any statute of limitations defense that has arisen since the commencement of this action in the Southern District [of New York]").

For the reasons stated above, and those unstated, plaintiffs' motion for reconsideration is denied. Plaintiffs' motion to amend the order of dismissal is granted, but only to the extent that each defendant must consent to the tolling of any applicable statute of limitations for the period that these actions were pending in the United States plus 30 days.

[Footnote continued from previous page]
ranted to allow plaintiffs a reasonable time following dismissal of this action to prepare and file a new complaint in Ontario.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Second Circuit
United States Court House
40 Foley Square
New York 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13 day of June two thousand two.

In Re: Philip Services

Gabriel DiRienzo, et al

Plaintiffs-Appellants,

v. Dkt No: 99-7825

Philip Services,

Defendants-Appellees.

Petitions for panel rehearing and a [sic] petitions for rehearing en banc having been filed by the Appellees Deloitte & Touche, Fracassi, et al and Salamon Brothers.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petitions for rehearing are DENIED.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/
Arthur M. Heller,
Administrative Attorney

Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

(2)

No. 02-397

IN THE

Supreme Court of the United States

DELOITTE & TOUCHE LLP, *et al.*,

Petitioners,

v.

GABRIEL DiRIENZO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

The issue raised by the Petitioners is whether the decision of the United States Court of Appeals for the Second Circuit in this case "conflicts with this Court's *forum non conveniens* jurisprudence and the law of ten other circuits." Petition ("Pet.") at 1. However, the Second Circuit opinion does not hold what Petitioners claim it holds. Rather, the Second Circuit opinion assiduously and consistently applied the *forum non conveniens* method of analysis established by this Court. Nor is the ruling below in conflict with any decision of the other circuit courts.

The Second Circuit's ruling was proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

I. Factual and Procedural Background

These consolidated securities class actions, originally filed in February 1998, allege violations of the federal securities laws against Philip Services Corp. ("Philip" or the "Company"),[1] several of Philip's officers and directors, Deloitte & Touche LLP ("Deloitte") (the Company's outside auditor) and several investment banks (the "Underwriter Petitioners"). Philip purported to be, at all relevant times, "an integrated resource recovery and industrial services company, which provides metal recovery and processing services, by-products recovery and industrial services to major industry sectors throughout North America." Appendix C, p. 78a.[2] The Company maintained headquarters in Pittsburgh, Pennsylvania and Ontario, Canada. *Id.*

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1. On June 25, 1999, Philip filed for protection under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Thereafter, Respondents and Philip agreed to settle the claims asserted against it through the Bankruptcy Court proceedings. Therefore, Philip was not a party to the appellate proceedings below.

2. References to "Appendix" are to the Appendix to the Petition For A Writ of Certiorari.

During the Class Period,[3] Philip's stock traded on the New York Stock Exchange (the "NYSE"), the Toronto Stock Exchange and the Montreal Stock Exchange. Prior to April 30, 1996, Philip stock traded on the NASDAQ. *Id.* Nearly 80% of all Philip shares traded during the Class Period were traded on exchanges in the United States. Appendix B, p. 26a.

Philip's business plan called for dominating the United States market for resource recovery and industrial services; between 1992 and 1997, Philip substantially expanded its revenue base, range of services and network of facilities throughout North America. Appendix C, p. 78a. The United States served as Philip's primary base of operations during the Class Period and its physical presence here was substantial: operational facilities in 12 states and the acquisition of 15 United States companies during the Class Period. For example, in 1997, Philip acquired two United States-based corporations — Allwaste, Inc. ("Allwaste") and Serv-Tech, Inc. ("Serv-Tech") — in stock-for-stock deals worth a total of approximately $560 million. Appendix C, p. 78a. In connection with the acquisitions of Allwaste and Serv-Tech, Philip filed registration statements with the U.S. Securities and Exchange Commission (the "SEC"). Appendix C, p. 79a. Philip also filed numerous other filings with the SEC. Seventy percent of the Company's revenues were generated in the United States. Appendix B, p. 24a.

Capitalizing on its attractive nexus with the United States, in November 1997, Philip completed two secondary public offerings, which together raised approximately $380 million. Appendix C, p. 78a. One offering, made exclusively to investors in the United States by seventeen United States-based investment banks, raised approximately $284 million pursuant to a Registration Statement filed with the SEC (the "November 1997

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3. Respondents assert claims on behalf of: a class of all persons who purchased Philip common stock and call options during the period from February 28, 1996 through May 7, 1998 (the "Class Period") and on behalf of two Sub-Classes related to registered offerings or exchanges for Philip stock in the United States.

Offering"). Appendix C, pp. 78a-79a. The other offering, which raised approximately $94 million, was made only to investors outside the United States, and was underwritten by eight Canadian securities firms (the "Canadian Underwriters").[4] Appendix C, p. 79a.

Just over two months after the public offerings, on January 26, 1998, Philip announced that it would take "charges to earnings" for fiscal year 1997 of between $250 and $275 million. Appendix C, p. 79a. Over the next several months, this figure was raised to over $381 million, of which $125 million was reported to arise from overstated copper inventory and unrecorded copper-trading losses. *Id.* Philip also restated its previously issued financial statements for fiscal years 1995, 1996 and 1997. *Id.*

The restated financial statements disclosed that 1995 earnings had been overstated by approximately $22.5 million, or 690%, and that 1996 earnings had been overstated by $48.3 million. Appendix C, p. 79a. Instead of posting a $28.4 million profit in 1996, as Philip had initially reported, the Company recorded losses totaling approximately $20 million. *Id.* As a result of these disclosures, the share price of Philip stock dropped sharply, from $13 1/8 on January 16, 1998 to $2 9/16 in July 1998, a decline of approximately 80%. *Id.*

After these disclosures, more than 20 class action lawsuits were commenced in the United States District Courts for the Southern District of New York, the Western District of Pennsylvania, and the District of New Jersey. Appendix C, p. 80a. By Order dated June 2, 1998, these actions were transferred to the Southern District of New York by the Judicial Panel on Multidistrict Litigation (the "JPML") and the actions were subsequently consolidated for pre-trial purposes. Appendix C, p. 80a.[5]

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4. Purchasers in the non-United States offering are *not* members of the Class.

5. In June of 1998, several months after the class actions were commenced in the United States, a class action complaint was filed in (Cont'd)

The United States District Court for the Southern District of New York (the "District Court"), by Order dated July 23, 1998, appointed several individuals and one investment company to act as Lead Plaintiffs[6] (the "Respondents") pursuant to Section 21D(a)(3)(B) of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B).[7] Respondents suffered substantial losses on their investments in Philip common stock both collectively and individually. For example, Lead Plaintiffs Toll and Gans — both

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(Cont'd)
the Ontario Superior Court on behalf of residents of Canada who purchased Philip shares through the international secondary offering in November 1997 and on the Toronto and Montreal Stock Exchanges (the "Menegon Action"). Named as defendants in the Menegon Action are Philip, Deloitte and the Canadian Underwriters responsible for the Canadian offering (who are not defendants in this action). None of Philip's individual officers and directors is named as a defendant in the Menegon Action. Appendix C, p. 79a-80a.

6. The Lead Plaintiffs are: Gabriel DiRienzo, Carol F. Brink, William R. Brink, Robert Gans, Bruce E. Toll, Walter Chompski, Bradwal Investments, LTD, Deborah Mieczkowski, Robert W. Hillger, Gregory Mappus, Albert Solkov, Michael Isaacs and Sophia Isaacs.

7. The PSLRA requires district courts to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . .". 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA contains a presumption that the most adequate plaintiff is the person or group of persons who has the "largest financial interest in the relief sought by the class" and who "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78(u)-4(a)(3)(B)(iii)(I). Congress enacted the PSLRA, in part, to address the perception that securities class action litigation was largely "lawyer-driven." H.R. Conf. Rep. No. 104-369 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730; S. Rep. No. 104-98 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679. Indeed, one of the purposes of the PLSRA was to enable investors with significant losses to control the course and conduct of the litigation to align more closely the interests of significant shareholders with those of the Class members. *Id.*

residents of the United States — invested more than $6.4 million and $3.5 million in Philip, respectively, investments which have become essentially worthless as a result of the fraud. Collectively, the Lead Plaintiffs invested over $12 million in Philip common stock. Notably, Lead Plaintiffs Gans and DiRienzo reside in the Southern District of New York.

On September 11, 1998, the Respondents filed their Consolidated Amended Class Action Complaint (the "Complaint" or "¶ __"), alleging violations of: (1) Sections 10(b) and 20 of the Exchange Act, 15 U.S.C. § 78j(b); 78t; (2) SEC Rule 10b-5, 17 C.F.R. § 240.10b-5; and (3) Sections 11, 12(a) and 15 of the Securities Act, 15 U.S.C. § 77k, 77*l*(a)(2), 77o. Appendix C, p. 80a. Respondents charged Philip and certain of its officers and directors with making materially false and misleading statements concerning its publicly reported revenues, earnings, assets and liabilities. *Id.*

Respondents also asserted claims against Deloitte in connection with its audits of Philip's financial statements for fiscal years 1995 through 1997. Appendix C, p. 80a. Deloitte, a member of Deloitte Touche Tohmatsu, a worldwide organization of affiliated accounting firms headquartered in New York City, issued unqualified opinions on Philip's 1995, 1996 and 1997 year-end financial statements. Appendix A, p. 7a. The Complaint alleges Deloitte had actual knowledge of the fraud as early as January 1997 during the audit of Philip's 1996 financial statements, and, nevertheless, permitted the fraud to continue undisclosed for more than a year. ¶¶ 305-318.

The Underwriter Petitioners are sued for their roles in connection with the November 1997 Offering. *Id.* As a result of the underwriters' actions, Philip was able to tap the United States equity market, entice Respondents and thousands of other United States investors and perpetrate a fraud on them by selling now virtually worthless stock at massively inflated prices. United States counsel prepared the November 1997 Offering materials; United States investment banks underwrote the Offering; and the Offering closed in New York. ¶ 17.

As detailed in the Complaint, Philip and the Petitioners are alleged to have perpetrated a massive fraud upon Philip's investors, of whom the vast majority are United States residents. ¶¶ 166-259. In addition to overstating the value of Philip's copper inventory by more than $125 million, Philip was the subject of a pervasive accounting fraud which included the understatement of cost of goods sold, the overstatement and mischaracterization of revenues and earnings, the failure to record material and known liabilities, the overstatement of the value of numerous acquisitions, and the failure to record inter-company transactions properly. Much of this conduct involved Philip's United States subsidiaries, including, among others, Philip's Petrochem facility in South Carolina. ¶¶ 225-33.

Philip's financial condition was fundamentally misrepresented and overstated to the investing public throughout the Class Period. ¶¶ 92-212. The most blatant example of this fraud was Philip's overstated copper inventory. ¶¶ 172-81, 195-201, 207-12. Many of the fraudulent mechanisms used to overstate the Company's inventory and profits involved Philip's customers in the United States, including General Motors, and Philip's United States subsidiaries.

Although conceding the sufficiency of some of the Respondents' claims, in November 1998 the Petitioners filed motions to dismiss the Complaint on various grounds, including the doctrine of *forum non conveniens*.

II. The District Court's Decision

A. Presumption in Favor of Plaintiffs' Chosen Forum

On May 4, 1999, the District Court dismissed the Complaint on *forum non conveniens* grounds. The District Court began its analysis by acknowledging the "'strong presumption in favor of the plaintiff's choice of forum.'" Appendix C, p. 81a (quoting *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996). Although recognizing that "'dismissal usually is not appropriate unless the balance of convenience tilts strongly in favor of trial in the foreign forum,'" the District Court stated that the Respondents' choice of forum here was entitled to less weight. Appendix C,

p. 81a (citations omitted). As support for this finding, the District Court stated that Respondents "'have only a small direct interest in a large controversy in which there are many potential plaintiffs, usually in many potential jurisdictions.'" *Id.*

B. Private Interest Factors

After concluding that Ontario was an "adequate alternative forum," the District Court turned to the balancing of the public and private interest factors identified by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Appendix C, p. 92a. With respect to the private interest factors, the District Court concluded that such factors "strongly favor litigation in Ontario." Appendix C, p. 93a. Without crediting Respondents' claims that substantial aspects of the fraud were carried out in the United States and involved companies based here, the District Court determined that "[m]ost of [the fraudulent] activities took place in Ontario" and that "most of the key witnesses and the vast bulk of relevant evidence can be found" in Ontario. *Id.*

With respect to the costs associated with litigation, the District Court determined that Petitioners would incur substantially less costs if trial were held in Ontario, without considering the substantial costs Respondents would incur if forced to litigate there. Appendix C, p. 94a. Although seventeen investment banks and several individual Petitioners have principal places of business or reside in the United States, the District Court made factual determinations about the level of involvement by such Petitioners, and minimized their roles in the fraud before Respondents had an opportunity to conduct discovery. Appendix C, p. 94a.

The District Court flatly rejected the overwhelming connections this litigation has with the United States and deemed Respondents' arguments concerning this obvious nexus merely an "attempt[] to morphose [sic] this case into a dispute that concerns the United States," inexplicably concluding that "this case is about fraudulent conduct and improper record-keeping by a Canadian firm in Canada, and it involves the United States only indirectly or secondarily." Appendix C, p. 96a.

C. Public Interest Factors

With respect to the public interest factors, the District Court found largely that such factors favored neither Petitioners nor Respondents. Appendix C, p. 96a. Barely acknowledging the interests of the United States in adjudicating the rights of United States investors for stock they purchased in the United States on American stock exchanges including the NYSE, through United States stock brokers, the District Court stated merely that such an interest is not a "determinative factor to be considered in weighing convenience." Appendix C, p. 97a-98a. This determination was guided primarily by the District Court's conclusion that the Respondents here engaged in so-called "international transactions" by purchasing on the NYSE or from underwriters located in the United States shares of a public company that regularly filed reports with the SEC and conducted the majority of its business in this country. Appendix C, p. 97a.

Respondents, on July 7, 1999, filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit (the "Second Circuit").

III. The Second Circuit's Reversals of the District Court

A. The First Reversal of the District Court

On November 8, 2000, the Second Circuit reversed the District Court's dismissal in an opinion reported at *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49 (2d Cir. 2000) ("*DiRienzo I*"). The Second Circuit began its analysis by identifying the "ordinarily strong presumption favoring the plaintiffs [sic] chosen forum . . ." Appendix B, p. 31a. After noting that the defendant bears the burden of demonstrating that the plaintiff's chosen forum is not convenient, the *DiRienzo I* court stated "[b]ecause much of the doctrine's strength derives from its flexibility and each turns on its own facts, a single factor is rarely dispositive." Appendix B, p. 32a. The Second Circuit stated that its reviewing power includes "the right to determine whether the district court came to an erroneous legal conclusion or a clearly erroneous factual conclusion" and also to ascertain that the district court "considered all the relevant factors, and whether its balancing of those factors was reasonable." *Id.*

The *DiRienzo I* court agreed with the District Court's conclusion that Ontario offered an adequate alternative forum. After making this determination, the Second Circuit addressed the level of deference afforded plaintiff's choice of forum, recognizing that district courts must — particularly in close cases — defer to plaintiff's choice. Appendix B, p. 38a-39a. The Second Circuit followed this Court's decision in *Koster v. Lumbermans Mutual Casualty Co.*, 330 U.S. 518 (1947), by stating "plaintiffs should not be deprived of their choice of forum, except upon defendants' clearly showing that a trial there would be so oppressive and vexatious to defendant as to be out of all proportion to plaintiffs' convenience." Appendix B, p. 49a. The Second Circuit noted at the outset that the District Court failed to give Respondents' choice of forum adequate deference. Appendix B, p. 43a.

The Second Circuit also stated that the Respondents here "suffered injury in New York and in the United States" and thus, not surprisingly, seek to try the case in a United States forum. Appendix B, p. 41a-42a. The New York forum was chosen because a number of Lead Plaintiffs reside there.[8] Appendix B, p. 41a-42a. In fact, the *DiRienzo I* court stated, "[w]hile the Southern District of New York may not have a strong relationship with all of the plaintiffs, the weight of the class is certainly concentrated in the United States." Appendix B, p. 42a-43a.

In addressing the public interest factors, the Second Circuit determined that the District Court "erred by finding that the local interest factor weighed heavily in favor of litigation in Ontario." Appendix B. p. 44a. Moreover, the Second Circuit found that "the United States has a strong interest in enforcing its securities laws." Appendix B, p. 48a. While observing that Ontario also had an interest in enforcing its laws, the fact that "a small minority of the proposed Class" consisted of Canadian investors vitiated that interest. Appendix B, p. 49a.

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8. Indeed, Lead Plaintiffs Gabriel DiRienzo and Robert Gans are New York residents who filed their initial complaint in their home forum of the Southern District of New York.

With respect to the private interest factors, the Second Circuit found that Petitioners had failed to meet their burden of establishing that trial in the United States would be "oppressive and vexatious." Appendix B, p. 49a. After concluding its analysis, the Second Circuit reversed the District Court's order dismissing the case.

On November 22, 2000, Petitioners filed a petition for rehearing or, in the alternative, rehearing *en banc*. Thereafter, in December of 2001, the Second Circuit issued its decision in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc). In *Iragorri*, the Second Circuit considered "what degree of deference should the district court accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides." 274 F.3d at 69 (citations omitted). Applying the precedents of this Court, the *Iragorri* court stated:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*.

274 F.3d at 71-72. The Second Circuit requested, by Order dated December 18, 2001, that the parties submit letter briefs to address the significance, if any, of the *Iragorri* decision to Petitioners' November 22, 2001 petition for rehearing or, in the alternative, rehearing *en banc*.

B. The Second Reversal of the District Court

On April 1, 2002, the Second Circuit granted the Petitioners' petition for rehearing and issued another opinion, again reversing the District Court, in an opinion reported at

DiRienzo v. Philip Services Corp., 294 F.3d 21 (2d Cir. 2002) ("*DiRienzo II*"). In *DiRienzo II*, the Second Circuit reexamined the degree of deference a district court must afford a plaintiff's choice of forum in light of its *en banc* decision in *Iragorri*. Although recognizing the "substantial deference" afforded a district court's dismissal on the ground of *forum non conveniens*, the Second Circuit cautioned that reversal for abuse of discretion is appropriate where the district court's "decision rests on an error of law . . . or a clearly erroneous factual finding" or that decision "cannot be located within the range of permissible decisions." Appendix A, p. 8a. Importantly, the panel in *DiRienzo II* unanimously agreed on the analysis applied with respect to the deference afforded plaintiffs' choice, the issue on which Petitioners seek review.[9]

The Second Circuit began its analysis by considering the level of deference afforded a plaintiff's choice of forum and recognized that this Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) precludes overriding plaintiffs' choice of forum "unless the balance is strongly in favor of the defendant." Appendix A, p. 8a-9a. Looking to its *en banc* decision in *Iragorri*, the Second Circuit noted that district courts should "begin with the assumption that a plaintiff's choice of forum will stand unless the defendant can demonstrate that reasons exist to afford it less deference." Appendix A, p. 9a.

Modifying its analysis in the *DiRienzo I* decision, the Second Circuit considered the District Court's finding that Respondents were entitled to less deference on their choice of forum because they are proceeding in a representative capacity and assumed that the District Court's reasoning was correct. Appendix A, p. 9a-10a. Even assuming, however, that this Court's decision in *Koster* (which the District Court relied on)

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9. Judge Cabranes, who dissented in *DiRienzo I*, dissented in part in *DiRienzo II*. The dissent was limited to his disagreement with the majority over the level of deference afforded to the District Court's balancing of the public and private interest factors. Appendix A, p. 20a-21a.

applied to securities fraud class action litigation as well as derivative actions, the Second Circuit stated: "affording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum," and observed that the District Court "made only [a] passing reference to the weight entitled plaintiffs' choice" of forum. Appendix A, p. 9a.

The Second Circuit then considered whether the plaintiffs' choice was "dictated by reasons that the law recognizes as valid," *id.*, and found that Respondents' choice was driven largely by the facts presented in this litigation: investors in the United States purchased shares of stock traded on the NYSE of a public company who filed reports with the SEC and conducted the majority of its business in the United States. Appendix A, p. 10a. Thus, the *DiRienzo II* court reasoned, United States investors would naturally pursue litigation here. *Id.* Moreover, the Second Circuit noted that Respondents had chosen several different district courts within the United States but that the Southern District of New York was ultimately chosen based on a motion made by certain of the Petitioners to the JPML to have the case heard in New York. Indeed, the JPML ultimately found "[c]entralization . . . in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." Appendix A, p. 11a.

In light of certain of the Petitioners' desire to have the litigation centered in the Southern District of New York, the Second Circuit critically examined Petitioners' later-made claims that New York was profoundly inconvenient.[10] Appendix

10. In their Brief in Support of Motion to Transfer before the Judicial Panel on Multidistrict Litigation, certain of the Petitioners stated "transfer to New York for consolidation or coordination will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." The PSC Parties' Brief in Support of Motion to Transfer, p. 15. The Underwriter Petitioners "adopt[ed] and incorporate[d] . . . by reference" the PSC Parties Brief and similarly stated "New York is by far the most convenient place for the parties to these actions." Response of the Underwriter Defendants in Support of the PSC Parties' Motion to Transfer, p. 6.

A, p. 11a. Thus, the Second Circuit appropriately examined the reasons behind Petitioners' choice of forum. *Id.* Importantly, however, the Second Circuit also determined that the existence of the JPML order was in no way outcome determinative, stating:

> With respect to the complaint being filed in the Southern District of New York, plaintiffs have another reason that the law recognizes as valid: the transfer order of the Judicial Panel on Multidistrict Litigation placed their cases there. Although the consolidated and amended class action complaint was filed after the transfer order – ***and the transfer order, standing alone, is not dispositive or outcome-determinative*** — nothing in the record suggests that this filing was motivated by anything other than this order.

Appendix A, p. 10a (emphasis added).

The Second Circuit agreed with the District Court's determination that Ontario offered an adequate alternative forum to Respondents. Appendix A, p. 11a. The Second Circuit similarly agreed that much of the evidence was in Ontario but noted that Petitioners "failed to explain . . . how transporting the documents or copies of them would be 'oppressive' or 'vexatious.'" Appendix A, p. 12a. Accordingly, the Second Circuit held that "the district court committed a legal error by failing to hold defendants to their burden of proof." *Id.* The Second Circuit also agreed with the district court's factual conclusion that most of the witnesses are located in Ontario but again noted that Petitioners had not made any showing how a 90 minute direct flight between Ontario and New York would be burdensome for witnesses. Appendix A, p. 13a. And finally, while acknowledging the availability of letters rogatory and videotaped depositions, the Second Circuit found the district court had not abused its discretion in finding that the inability to compel third-party witnesses to appear for trial in the United States weighed in favor of Petitioners. Appendix A, p. 13a-14a.

In sum, the Second Circuit found that the balancing of the private interest factors was "close," a finding which did not support dismissal because of *Gilbert*'s mandate that "unless the balance strongly favors defendant, plaintiffs' choice of forum should rarely be disturbed." Appendix A, p. 14a (citation omitted).

In addressing the public interest factors, the Second Circuit found that these factors favored Respondents. The Second Circuit determined that the local interest heavily favored the United States and concluded that the District Court's determination to the contrary was "clearly erroneous" because:

> [i]t fails to acknowledge as a factual matter that plaintiffs' amended complaint alleges the majority of their securities transactions were conducted entirely in the United States, by Americans, in American dollars, on American Stock exchanges. For example, plaintiffs claim that nearly 80 percent of Philip's shares sold during the class period were traded on exchanges in the United States.

Appendix A, p. 15a.

Further, the Second Circuit rejected the notion that Respondents here engaged in "international transactions." Indeed, the *DiRienzo II* court determined that this finding, and the District Court's conclusion that the United States interest in the litigation was insignificant, precluded a reasonable balancing of the *Gilbert* factors, thereby pushing the District Court's decision outside the "permissible range of decisions." Appendix A, p. 17a-18a. With respect to the United States' interest, the Second Circuit stated:

> A strong public interest favors access to American courts for those who use American securities markets. The fraud on the market theory itself illustrates investors' reliance on accurate and complete information. For securities markets to function efficiently, securities fraud law must be clear and enforceable. As the statute explaining the need

> for regulation and control of transactions in securities exchanges and over-the-counter markets states, these transactions are affected with a national public interest. Thus, those laws must also be applied consistently with regard to the significant majority of the putative class members who bought their securities on American markets.

Appendix A, p. 18a (citations omitted).

In light of the foregoing and the Petitioners' "failure to show oppressiveness and vexation out of all proportion to plaintiffs' convenience" — as required by *Koster* — the Second Circuit found that the District Court "erred as a matter of law when granting the motion to dismiss this case in favor of it being brought in Canada." Appendix A, p. 19a. Relying on this Court's decisions in *Piper* and *Koster*, the Second Circuit appropriately stated:

> Consequently, although defendants may have shown Canada to be *an* appropriate forum, they have not met their burden of proving that litigation in the United States is unnecessarily inconvenient for them to a degree much greater than the convenience that would be afforded plaintiffs by trial in the Southern District of New York.

Appendix A, p. 19a (emphasis added).

Petitioners again filed a petition for rehearing *en banc* to the Second Circuit. On June 13, 2002, the Second Circuit denied the petition for rehearing *en banc*. The instant petition for certiorari followed.

ARGUMENT

I. This Court's Long-Standing Precedents Firmly Establish That Parties' Motives Are Highly Relevant To Determining The Amount Of Deference Owed To A Plaintiff's Choice Of Forum

Petitioners seek review asserting that the decision below is contrary to this Court's holdings in *Gilbert* and *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). In so arguing, Petitioners mistakenly contend that the Second Circuit's "subjective motives-based approach to determining the deference owed to the plaintiff's choice of forum" (Pet. at 20.) somehow establishes a novel approach for determining *forum non conveniens* motions.

Yet, in both *Gilbert* and *Piper*, this Court used a motives-based analysis in determining what deference to accord a plaintiff's choice of forum. Consequently, neither *DiRienzo II*, nor *Iragorri*, represents any departure from this Court's traditional *forum non conveniens* jurisprudence. The decision below is in full accord with this Court's precedents.

Gilbert established the strong presumption that "the plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508. But *Gilbert* also noted the role of the trial court with respect to *forum non conveniens* included "resist[ing] imposition upon its jurisdiction . . . those who seek not simply justice but perhaps justice blended with some harassment." *Id.* at 507. Turning its eye directly toward the plaintiff's motives in filing suit in the forum at issue, the *Gilbert* court held that "[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself." *Id.* This Court in *Gilbert* looked to the motives as to why the plaintiff filed suit in the chosen jurisdiction in determining whether the plaintiff was entitled to the usual presumption that the plaintiff's forum choice rarely be disturbed. Indeed, the Court noted that the plaintiff

was unable to even make a "showing that the present forum serves any convenience of his own . . ." 330 U.S. at 509.

In *Piper*, this Court confronted the express question of the deference afforded the plaintiff on a *forum non conveniens* motion. 454 U.S. 235. That case involved an airplane crash in Scotland where the pilot and five passengers died. *Id.* at 239. The decedents were all Scottish subjects. A California probate court appointed respondent, Gaynell Reyno, as the administratrix of the estate of the five deceased passengers. Reyno commenced suit in her home district, which was ultimately transferred to the Middle District of Pennsylvania. *Id.*, at 238. Although the Court reaffirmed the principle that "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum . . ." the Court looked at who the real parties in interest were — the Scottish decedents — and found that a foreign plaintiff's choice of forum deserves less deference than that of the domestic plaintiff. *Id.* at 265-66.

Confronted with a foreign plaintiff's action brought in the United States for the sole reason that U.S. law was advantageous, the *Piper* court first validated its pre-*Gilbert* decision in *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932), which affirmed a district court's dismissal on grounds of *forum non conveniens*. *Piper*, 454 U.S. at 247. That case likewise involved foreign plaintiffs who, this Court noted, chose a U.S. forum "in large part because the relevant American liability rules were more favorable than the Canadian rules." *Id.*

Piper seized upon *Canada Malting*'s measure of plaintiff's motives in choosing a U.S. forum stating, "the central focus of the *forum non conveniens* inquiry is convenience . . ." *Piper* at 249. The normally strong assumption that plaintiff's choice of forum stands is lessened, and "dismissal will ordinarily be appropriate where the plaintiff is unable to offer any specific *reasons of convenience* supporting his choice." *Id.* (emphasis added). Thus, in *Piper* this Court placed heavy emphasis on plaintiff's motives, finding such analysis necessary "where a plaintiff chooses a particular forum, not because it is convenient,

but solely in order to harass the defendant or take advantage of favorable law." *Id.* at n.15.

The Second Circuit's test for the level of deference to be accorded a plaintiff's choice of forum is entirely consistent with *Gilbert* and *Piper*. The common thread of *Gilbert* and *Piper* is whether the plaintiff has a legitimate reason, a reason of convenience, in bringing the action in the chosen forum. If so, then the plaintiff's forum choice should rarely be disturbed. Below, the Second Circuit articulated a standard by which to measure the motives behind the plaintiffs' filing of the lawsuit in the chosen forum, finding that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." In measuring those motives in this case, the Second Circuit found that:

> [P]laintiffs offered a quite valid reason for litigating in federal court: this country's interest in having United States courts enforce United States securities laws. We recognize that this interest is not outcome-determinative in the weighing of relevant factors, but it nonetheless demonstrates a "bona-fide" connection to the United States, that is, a valid reason. Further, considering that defendants sought out business opportunities in this country by registering stock on American exchanges, filing statements with the SEC and conducting the bulk of its business in the United States — as well as the claim that most plaintiffs conducted their stock transactions within the United States — a legitimate interest exists in trying this securities fraud litigation here. The SEC reiterated that point in a post-*Iragorri amicus* letter to the Court.

DiRienzo II, 294 F.3d at 28.

Thus, the Second Circuit's decision was faithful to this Court's decisions in both *Gilbert* and *Piper*. There is no need for review by this Court.

A. There Is No Conflict Between The Second Circuit's Decision and The Decisions of Other Circuit Courts

Petitioners contend that the Second Circuit's decision is in conflict with all the other Circuits, and therefore, review is warranted. According to Petitioners, only the Second Circuit employs a "subjective motives-based" "sliding scale" test to determine the deference owed to a plaintiff. In contrast, Petitioners contend, each of the other Circuits employs a bright-line "objective status-based" test. Pet. at 20.

According to Petitioners, courts are to employ a bright-line test to determine the level of deference owed to the plaintiff: if the plaintiff is a forum resident suing in an individual capacity, then full deference is accorded the forum choice. If, however, the plaintiff is foreign, or suing in a representative capacity, then limited deference applies. *Id.* Yet Petitioners' articulation of the "proper test" of what level of deference is afforded a plaintiff on a *forum non conveniens* motion is actually at odds with both *Gilbert* and *Piper* and would require this Court to overturn these long-standing precedents.

In *Piper*, this Court looked beyond the fact that the named plaintiff was a U.S. citizen and instead looked to the "real parties in interest" to determine what degree of deference was owed to the plaintiff. 454 U.S. at 255. Under Petitioners' articulation of the standard to be employed, however, this Court would have been required to simply determine that, because plaintiff Reyno sued in her home forum, full deference was to be applied to her choice of forum.

Moreover, as detailed above, both *Gilbert* and *Piper* were concerned with the motives underlying plaintiff's choice of forum. Petitioners, however, reject this Court's long-standing application of a motive based analysis and suggest in its place a formulaic test: when a plaintiff sues in his home forum, full deference applies, regardless of the reason why that forum was selected. Petitioners seek to deprive district courts of the "flexibility" of the *forum non conveniens* analysis that this Court has found to be "so valuable." *Piper*, 454 U.S. at 250.

In advocating review by this Court, Petitioners strain to create a conflict where none exists. Indeed, no other Circuit has considered the Second Circuit's decision in either *DiRienzo II* or *Iragorri* and there simply is no conflict for this Court to resolve. A careful reading of the cases cited by Petitioners to demonstrate this so-called conflict — *Alpine View Co. Ltd. v. Atlas Copco*, 205 F.3d 208 (5th Cir. 2000) and *Leon v. Million Air Inc.*, 251 F.3d 1305 (11th Cir. 2001) — shows that none exists.

In *Alpine View*, the Fifth Circuit affirmed the district court's grant of a *forum non conveniens* motion in an action brought in Harris, County Texas (and subsequently removed to the Federal District Court) by two Swedish holding companies against two Delaware corporations, one with its principle place of business in Massachusetts and the other in New York. 205 F.3d at 211-12. The action arose concerning a business contract providing that any dispute was required to be arbitrated in Oslo, Norway. *Id.* The sum total of the Fifth Circuit's discussion of the degree of deference to be afforded the plaintiffs is as follows: "Appellants recognize that, as foreign plaintiffs, their initial choice of forum merits less deference than courts typically give to such decisions." *Id.* at 222 (citing *Piper*, 454 U.S. at 255).

In *Leon*, the Eleventh Circuit (in an opinion authored by the Hon. Jon O. Newman, sitting by designation from the Second Circuit) affirmed the dismissal of a tort action under the doctrine of *forum non conveniens*. There, citizens of Ecuador brought suit in Florida concerning a plane that crashed in Manta, Ecuador immediately after take-off and which killed a number of plaintiffs' relatives. Defendant was headquartered in Florida. 251 F.3d at 1305. The court's discussion of the deference afforded the plaintiff's forum choice consists of the following: "However, the presumption that a plaintiff has chosen a sufficiently convenient forum 'weakens' when the plaintiff is a foreigner litigating far from home and in such cases plaintiff's forum choice is accorded 'less deference'." *Id.* at 1315 (citing *Piper*, 454 U.S. at 255).

Petitioners also assert that the Second Circuit's employment of a "sliding scale" approach is inconsistent with other precedent. Petitioners maintain, "courts give either *full* deference, as in *Gilbert*,[11] or *limited* deference, as in *Koster* and *Piper*." Pet. at 20. Yet this is precisely what the Second Circuit did in *DiRienzo II* when it afforded the plaintiffs "less deference" because they sued in a representative capacity but found that even affording the plaintiffs limited deference "does not mean that they are deprived of all deference in their choice of forum." Appendix A, p. 99. In fact, *Leon* affirms that this is precisely what other Circuits do. 251 F.3d at 1315 (lower court still accorded "Plaintiffs' forum choice at least the diminished presumption of convenience to which it is entitled . . .").

B. The Second Circuit's Decision Neither Double Counts Factors Nor Does It Predetermine the Outcome of *Forum Non Conveniens* Motions

Petitioners' contention that the Second Circuit's decision causes factors to be "double counted" is also meritless. Under the framework established by this Court in *Gilbert* and *Piper*, courts are to first determine the degree of deference owed to the plaintiff and then determine whether the public and private interest factors weigh in favor of transfer. It requires district courts to analyze the proper degree of deference to be accorded the plaintiffs' forum choice and then weigh the public and private interest factors to determine whether the weight of these factors, counter-balanced by the deference afforded the plaintiff, is sufficient to support dismissal. The Second Circuit approach follows this analysis. It took into account the appropriate degree of deference at each stage of the balancing analysis because that is what a balancing test requires — a continual comparative weighing of factors. This is not "double-counting."

As this Court did in *Piper* and *Gilbert*, the Second Circuit in *DiRienzo II* recognized that the degree of deference is a material factor in the balancing process. First it determined that

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11. In *Gilbert*, this Court gave limited deference to plaintiff's choice of forum.

the lower court erred by not affording the plaintiffs even the lower deference they deserved, even assuming that the district court properly interpreted this Court's decision in *Koster*. *See* Point II, *infra*. On the private interest factors, the Second Circuit found that "on the evidence presented, we think the balance of the private interest factors is close."[12] Appendix A, p. 14a. With regard to the public interest factors, the Second Circuit found the lower court's conclusion that the these weigh "heavily in favor of . . . Ontario" (Appendix A, p. 97a) to be "clearly erroneous" because it "fails to acknowledge as a factual matter that plaintiffs' amended complaint alleges the majority of their securities transactions were conducted in the United States, by Americans, in American dollars, on American Stock Exchanges." Appendix A, p. 15a-17a

In sum, the Second Circuit reversed because the district court's dismissal failed to accord any deference to plaintiffs' forum choice considering the "relatively even balance among the private interest factors" and that "the public interest factors favored an American forum." Appendix A, p. 19a.

In addition, while Petitioners take issue with the Second Circuit's noting of their possible forum shopping motives below, other Circuits do the same and even weigh this consideration more heavily. For example, in *Pain v. United Tech. Corp.*, 637 F.2d 775 (D.C. Cir. 1980), the DC Circuit looks not only to the plaintiff's but the defendant's forum shopping motives when reviewing a lower court's *forum non conveniens* analysis. "In short, trial judges applying the doctrine of forum non conveniens must walk a delicate line to avoid implicitly sanctioning forum shopping by either litigant at the expense of the other." *Id.* at 784.

Finally, Petitioners' assertion that *DiRienzo II* will always result in transnational classes being anchored in the United States is spurious. *DiRienzo II* merely applies the holdings of *Gilbert*

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12. Thus Petitioners' claim that the Second Circuit resolved the private interest factors in favor of Respondents misstates the lower court's holding.

and *Piper*, as recently examined by the Second Circuit in *Iragorri*, to the facts of this case. A different set of facts — for example, if a foreign issuer did not have the level of United States contacts that Philip did — might lead to a different result under the same analytical framework. In contrast, if Petitioners' interpretation of *Gilbert*, *Piper*, and *Koster* were to apply, or if such securities purchases were to be deemed international transactions as held by the District Court, foreign issuers of securities would always be free to escape the reach of United States laws for harm caused to United States citizens from their purchases of securities in the United States. This is surely not the result intended by this Court's prior *forum non conveniens* rulings.

II. Review Is Not Warranted Here As There Is No Conflict Over The Deference Owed To A Securities Class Action Plaintiff's Choice of Forum

A. *DiRienzo II* Did Not Decide The Question of Whether *Koster* Requires Diminished Deference For The Choice of Forum of A Class Action Representative

Petitioners' second argument for review is premised on the following misstatement of the holding of the court below:

> [t]he court below declined to follow this Court's holding in *Koster*, opting instead to follow its own holding in *Iragorri*. . . . Despite respondents' status as class representatives, the court below afforded respondents' choice of forum full undiminished deference under *Gilbert*. . . .

Pet. at 26.[13] The court below did no such thing.

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13. Respondents note that *Koster* involved the issue of transfer between district courts within the United States. This type of transfer motion is now governed by 28 U.S.C. § 1404, enacted by Congress in 1948, one year after this Court's decision in *Koster*. Thus, the facts in *Koster* would no longer give rise to a motion to dismiss on grounds of *forum non conveniens*, but would instead be addressed in the context of

(Cont'd)

After explicitly vacating that portion of the *DiRienzo I* decision in which the majority disagreed with the District Court's interpretation of *Koster*,[14] *DiRienzo II* held that "even were the district court correct" in its interpretation of *Koster*, "[a]ffording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum. The trial court, however, after interpreting *Koster*, appears to have made only passing reference to the weight entitled plaintiffs' choice." Appendix A. p. 9a. Therefore the Second Circuit applied *Koster* precisely in the manner Petitioners argue it should be applied — providing diminished deference to Class plaintiffs' choice of forum. Accordingly, review is unnecessary.[15]

The Second Circuit also viewed petitioners' *forum non conveniens* motion with skepticism because "the defendants' current claims of inconvenience raise questions as to their underlying motives." Appendix A, p. 11a. In particular, the Court questioned why the petitioners argue the inconvenience of litigating in a forum which they had previously found quite convenient for the advancement of their business objectives. *Id.*, 10a ("considering that defendants sought out business opportunities in this country by registering stock on American exchanges, filing statements with the SEC and conducting the bulk of its business in the United States"); *see also Iragorri*, 274 F.3d at 75 ("Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of

(Cont'd)

a § 1404(b) change of venue motion. *See Piper*, 454 U.S. at 264-265 (district courts have less discretion to dismiss under forum *non conveniens motions* than under § 1404 transfer motions).

14. Thus declining to decide the question of whether the *Koster* exception applies to class action representatives. Appendix A. p. 9a.

15. Petitioners' arguments regarding *Koster* are inherently inconsistent. They argue, incorrectly, that review is warranted because the Second Circuit did not follow *Koster*. Yet, they also concede that this "Court has not addressed the application of *Koster* to class actions." Pet. at 29.

forum non conveniens not because of genuine concern with convenience but because of similar forum-shopping reasons."). As discussed in more detail below, one of the principle concerns behind the development of the doctrine of *forum non conveniens* is to prevent unfair forum shopping. "[I]t is not a legitimate advantage to a plaintiff to vex his opponent." *Koster*, 330 U.S. at 535. *See also* Point I, *supra*.

B. There Is No Conflict Among the Circuits Over the Level of Deference to Be Afforded To A Securities Class Representative's Choice of Forum

Petitioners' second argument for review is also premised upon the unsupported assertion that the lower courts are divided on the issue of the application of *Koster* to securities class actions or that there exists an important and unresolved issue of federal law. Although Petitioners cite several District Court cases in support of their conflict argument (Pet. at nn.14-15), none of the cases cited are Circuit Court decisions. It would thus appear that, with the exception of the Second Circuit's decision in *DiRienzo II*, none of the federal Circuits has even considered the issue of whether the *Koster* exception of diminished deference must be extended to securities class action litigation. Without evidence of a conflict among the decisions of the federal circuits, there is no justification for this Court's review of the decision below. *See Taylor v. United States*, 493 U.S. 906, 907 (1989). Moreover, even if conflicting decisions of the District Courts were sufficient evidence of an unresolved important federal question, the cases cited by Petitioners (Pet. at n.14.) do not demonstrate any conflict over this issue.

For example, the first case cited by Petitioners is not a securities class action and the plaintiffs therein were divided over the issue of transfer. The plaintiffs in *Barney v. State of Alabama*, 171 F. Supp. 2d 1292 (S.D. Ala. 2001) had brought two separate actions challenging the defendants' decision not to redistrict Alabama's congressional election districts based upon the results of the 2000 census. Noting that one of the plaintiffs had agreed to the transfer, the court decided to transfer

both cases to the Middle District of Alabama where another case challenging the failure to redistrict was already pending.

The remaining cases cited by Petitioners involving class litigation under the federal securities laws fall short of squarely addressing any *Koster* based requirement of diminished deference to plaintiffs in securities class actions. In *Rosen v. Fidelity Fixed Income Trust et al.*, Civ. A. No. 95-2365, 1995 WL 560037 (E.D. Pa. September 20, 1995) the court noted the decision in *Koster* (*id.* at *8), but also acknowledged the merit of plaintiff's argument that the venue provisions of the Securities Act manifest a congressional intent to provide securities plaintiffs with the broadest possible choice of venue. *Id.* at *10. Ultimately, the court avoided the issue of deference. "[E]ven if the broad venue provision were entitled to no weight, I conclude that, even minimal consideration to Plaintiff's choice of forum, when considered with the other factors that bear on the issues of convenience and fairness, dictates that this action remain here." *Id.* at *10-11.[16]

16. The court in *Job Haines Home for the Aged v. Young et al.*, 936 F. Supp. 223 (D. N.J. 1996) also considered plaintiff's arguments regarding the broad venue provisions of the Securities Act but found defendants had demonstrated "hands down" that the case should be transferred *Id.* at 231 ("[E]ven if the Court were to conclude that plaintiff's choice of forum were entitled to substantial deference, these factors weigh sufficiently in favor of a transfer to override any such preference.") The court in *Guenther v. Cooper Life Sciences, Inc.*, Civ. A. No. 4-88-503, 1998 WL 131340 (D. Minn. Dec. 5, 1988) likewise determined that the transfer decision was not a close one and would have been the same regardless of the level of deference given plaintiff's choice of forum. *See Guenther* at n.8. In the two remaining cases cited by Petitioners, the courts found ample reason to question plaintiffs' claims of convenience regarding their chosen forum. *See Hoefer v. United States DOC*, No. C 00 0918 VRW, 2000 U.S. Dist. LEXIS 9299, at *9 (N.D. Ca. June 28, 2000) (only one of named plaintiffs lived in California; three others lived in the proposed transferee forum where plaintiffs' counsel previously instituted similar lawsuit); *Blake Construction Co., Inc. v. International Harvester Co.*, 521 F. Supp 1268, 1269 (N.D. Ill. 1981) (plaintiffs in two of five pending actions had joined in defendants' motions for transfer).

C. *Koster* Does Not Preclude Giving Full Deference To A Securities Class Action Plaintiff's Choice of Forum

Petitioners argue that the diminished deference standard applied to a derivative plaintiff's choice of forum in *Koster* applies to any plaintiff acting in a representative capacity. Yet, *Koster* cautions that there is no "rigid rule to govern discretion" and that "the doctrine of *forum non conveniens* . . . resists formalization and looks to the realities that make for doing justice." 330 U.S. at 528. The court then cites with favor the decision in *Williams v. Green Bay & Western R. R.*, 326 U.S. 549 (1946), "a class suit brought to recover amounts alleged to be due to plaintiffs on debentures," in which the Supreme Court reversed the trial court's dismissal on *forum non conveniens* grounds. *Koster*, 330 U.S. at 528 (citing *Williams*, 326 U.S. at 557-60). *Koster* thus acknowledged the significant differences between representatives of derivative actions and class actions.

The forum in which a class action litigation is conducted does bear responsibility for certain administrative tasks in addition to its adjudicative function. *See Koster*, 330 U.S. at 525 (discussing approval of settlement, providing notice to class, and fixing attorneys' fees). However, *Koster* goes on to explain that these additional tasks require consideration of the forum's relationship to the whole group that plaintiff represents in order to determine the more appropriate forum.[17] In *Koster*, the real party in interest was the corporation; thus, the corporation's home forum had the closest connection to it, rather than the forum in which plaintiff resided. Here, the vast majority of the Class members represented by plaintiffs are U.S. citizens.

17. Petitioners argue that these administrative burdens demonstrate similarity between class and derivative actions. Pet. at 27. But petitioners misapply the analysis in *Koster*. Because a Canadian forum bears little relationship to the U.S. investors who make up the vast majority of those damaged by defendants' alleged fraud, the *Koster* analysis on this factor favors the U.S. forum as the more appropriate forum to take on these administrative responsibilities to the Class.

Thus it is the U.S. forum that has the most direct relationship to the Class and can most properly be made responsible for the administrative burdens of the class action.

D. *Iragorri* and *DiRienzo II* Follow The Principles of *Forum Non Conveniens* Enunciated in *Koster*

Koster — like *Gilbert* and *Piper* — firmly establishes that the motives of the parties in choosing a forum are among the primary factors to be considered by the courts when faced with a motion for dismissal under *forum non conveniens*. Indeed, this Court's decision in *Koster*, after noting the plaintiff's failure to specify how he would be inconvenienced if the litigation were transferred, and the unlikelihood of inconvenience to the plaintiff due to his status as a figurehead representative of a derivative case, rests primarily upon the Court's determination that plaintiff had made no showing that his choice of forum was based upon his convenience. Instead, it appeared that the forum had been chosen for purposes of "harassment" and to place the defendants at a disadvantage.

> We hold only that a district court, in a derivative action, may refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiff's response not only discloses so little countervailing benefit to himself in the choice of forum as it does here, but indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy.

Koster, at 531-32. Thus, the plaintiff was not entitled to the usual level of deference accorded a plaintiff with more legitimate motives. *See* Point I, *supra*.

Like the Court's decisions in *Gilbert* and *Piper*, the primary considerations that influenced the Court in *Koster* to give little weight to a derivative plaintiff's chosen forum are not present here where the issue is whether a class of U.S. investors should be deprived of an American forum to litigate their claims under the federal securities laws against a foreign issuer who registered

and sold its securities on the U.S. markets. In *Koster*, the Court viewed the plaintiff in the derivative case as a "mere phantom plaintiff with interest enough to enable him to institute the action and little more," *Koster*, at 525, because he lacked any real financial incentive to pursue the litigation absent unique procedural advantages of derivative actions. Under these circumstances, *Koster* considered the plaintiff as interchangeable with "hundreds of potential plaintiffs, all equally entitled to invest themselves with the *corporation's cause of action* and all of whom could with equal show of right go into their many home courts." *Id.* at 524 (emphasis added).

In this action, however, Respondents are the real parties in interest, who assert direct, personal claims against the Petitioners, and seek to recover substantial damages on their own behalf. Their adequacy to represent the Class, the typicality of their claims as compared to others in the Class, and their reliance on the misrepresentations of the Petitioners, are all at issue in this litigation. In contrast, the derivative plaintiff stands in the shoes of the corporation and sues to enforce a corporate right. His participation in the litigation is thus limited to proof of ownership of corporate securities to establish standing. *See Koster* at 525.

And unlike the derivative claims in *Koster*, which were governed by state law, this action involves issues of *federal* law alone, namely, violations of the Securities Act and the Exchange Act. These federal securities laws also provide additional support for distinguishing between representatives in derivative and securities class action litigation in light of the provisions of the PSLRA and the significant financial stake of the Lead Plaintiffs in this litigation. As noted above, respondent Bruce Toll's $6.4 million investment in Philip, and respondent Robert Gans' investment of more than $3.5 million, have become essentially worthless. The PSLRA has eliminated the type of interchangeable nominal plaintiff involved in *Koster* and replaced it with a system where plaintiffs with millions of dollars of losses have taken over the leadership mantle.

The fact that United States citizens with millions of dollars in individual losses have been in the forefront of the leadership in this case from its inception attests to the success of the PSLRA in attracting sophisticated and involved plaintiffs who can better protect the interests of other investors. The presumption in favor of these plaintiffs to have their federal securities claims tried in their home forum should not be lost simply because, in addition to seeking personal remuneration, they also choose to pursue a remedy for a class of similarly defrauded United States investors. If anything, because the objective is justice and fairness, *see Koster* at 528, such plaintiffs are arguably entitled to even greater deference in their choice of forum.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

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IN THE

Supreme Court of the United States

DELOITTE & TOUCHE LLP, ET AL.,

Petitioners,

v.

GABRIEL DIRIENZO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY BRIEF FOR PETITIONER

As the petition makes clear, the court of appeals deviated substantially from the decisions of this Court and of ten other circuits. Those other circuits analyze *forum non conveniens* motions by first determining, based on a small number of objective factors, whether to give either full or limited deference to a plaintiff's choice of forum, then balancing the relevant objective public and private interest factors. The court below eschewed that straightforward analysis in favor of a motives-based, sliding-scale approach that considers a potentially limitless range of subjective factors at the initial stage of determining the degree of deference a court should afford a plaintiff's choice of forum.

Respondents' opposition rests on two core premises. Both are demonstrably erroneous. First, respondents contend that this Court's *forum non conveniens* decisions use the same motives-based approach as that employed by the court below. In the fifty-five years since *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), were decided, however, neither this Court nor any other federal court has embraced the Second Circuit's motives-based approach to *forum non conveniens*. This Court's decisions expressly reject the parties' supposed motives as a subject for the *forum non conveniens* inquiry, and the decision below directly conflicts with the law of ten other circuits.

Second, respondents argue, in effect, that the court of appeals' motives-based approach amounts to no more than extraneous dictum. According to respondents, the court of appeals, in reversing the district court, in fact applied diminished deference to the respondents' choice of forum and thereby reached the same conclusion as a proper inquiry—i.e., one taking into account respondents' representative and partially foreign status—would have yielded.

This argument, however, seriously mischaracterizes the opinion below. Contrary to respondents' contention, the court of appeals did not hold that respondents' choice of forum should receive diminished deference because of respondents' representative or partially foreign status or that the district court erred by failing "to accord *any* deference" at all to respondents' choice of forum. Opp. 22 (emphasis added). Rather, relying directly upon its unique motives-based analysis, the court of appeals applied full, undiminished deference and reversed the district court for purportedly failing to give *sufficient* deference to respondents' choice of forum. Pet. App. 12a, 14a, 19a. Thus the court of appeals' novel motives-based approach is the linchpin of the judgment below.[1]

The decision below creates substantial uncertainty concerning how to determine the deference due a plaintiff's choice of forum. This Court's review is essential to bring clarity to this important issue of federal law.

I. This Court's Decisions Do Not Support A Motives-Based Test For Determining The Deference Due A Plaintiff's Choice Of Forum

1. Confronted with the Second Circuit's unprecedented motives-based approach to determining the deference due to a plaintiff's choice of forum, respondents contend that this Court's *forum non conveniens* decisions endorse a motives-based approach to evaluating deference. Opp. 16-21. This argument, however, is directly contradicted by the opinions themselves. First, neither *Gilbert*, nor *Koster*, nor *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), nor any other decision of this Court adopts or even suggests approval of a motives-based standard. To the contrary, those decisions all confirm that the focus of *forum non conveniens* analysis is

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[1] Evident also in the court of appeals' application of full deference was its refusal to apply the *Koster* principle that diminished deference is due when, as here, plaintiffs sue in a representative capacity.

convenience, not the parties' state of mind. "[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster*, 330 U.S. at 527. "[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . . ." *Piper*, 454 U.S. at 256.[2] The court below, by contrast, ignored convenience in resolving the deference question, focusing instead on whether respondents "had an improper motive in bringing suit" in New York. Pet. App. 10a.

Second, in *Piper*, this Court expressly *rejected* the motives-based analysis adopted below and that respondents advocate here. "We recognize, of course, that Piper and Hartzell may be engaged in reverse forum-shopping. However, this possibility ordinarily should not enter into a trial court's analysis of the private interests." *Id.* at 252 n.19. "If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum." *Id.*

Third, as this case illustrates[3], the inquiry into motives presents "substantial practical problems" that this Court's

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[2] Respondents misperceive the significance of the *Piper* Court's citation of *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). Far from indicating a reliance on parties' motives in selecting a forum, as respondents suggest (Opp. 17), the Court in *Piper* relied on *Canada Malting* solely for the proposition that a change in the substantive law should not receive substantial weight in the *forum non conveniens* analysis. *Canada Malting* itself contains no discussion of the deference due a plaintiff's choice of forum, and the question presented there was whether a federal court sitting in admiralty had the discretion to dismiss a case between foreigners concerning a collision in United States territorial waters. *Canada Malting* thus lends further support to the principle that convenience, not motive, drives *forum non conveniens* analysis.

[3] In an effort to shore up the court of appeals' treatment of petitioners' motives as suspect, respondents selectively quote from briefing sub-

forum non conveniens jurisprudence carefully seeks to avoid. *Piper*, 454 U.S. at 251. In *Piper*, the Court excluded consideration of the parties' substantive law preferences from the *forum non conveniens* mix because considering those preferences would embroil the courts in "complex exercises in comparative law." *Id.* Those exercises are as naught compared to the free-form subjective inquiry into motives mandated by the Second Circuit in this case. Contrary to respondents' contention, then, *Piper* does not support a motives test; indeed, it is flatly inconsistent with that approach.

Finally, respondents seize upon passing references in *Gilbert* to the risk that a plaintiff might take advantage of liberal jurisdiction and venue provisions to "harass" a defendant, as well as verbiage in *Koster* suggesting that plaintiffs could present no reasons of convenience for proceeding in their chosen forum. Far from supporting a motives standard, however, these snippets point precisely the other way. In neither case did the Court incorporate any consideration of plaintiff's state of mind into either the *Gilbert* private and public interest factors or the threshold determination of the deference due to plaintiff's choice of forum. Thus, even putting aside *Piper*'s express rejection of the parties' motives as a relevant consideration, the isolated references to the parties' state of mind quoted by respondents only serve to show that the Court excluded these nebulous considerations from the legal standard it prescribed.

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mitted to the JPML. Respondents misleadingly assert that some of the petitioners "desire[d] to have the litigation centered in the Southern District of New York." Opp. 12 & n.10. In fact, as noted in the petition, certain petitioners contended before the JPML that *if* consolidated pretrial proceedings were to be held in the United States, then New York was the best *domestic* forum for such proceedings, although Ontario was more convenient than New York and had the greatest connection to this litigation. Pet. 24 n.11. As noted in the petition, petitioner Deloitte & Touche LLP did not even join in the MDL motion or briefing, but was tarred with the same brush as the other petitioners. Pet. 23 n.11.

In short, contrary to respondents' contentions, this Court's opinions cannot be reconciled with the motives-based standard applied by the court of appeals.[4]

2. As demonstrated in the petition, determining how much deference a plaintiff's choice of forum should receive is distinct from the balancing of convenience factors that occurs later in the *forum non conveniens* analysis. Pet. 17-22. With the exception of the Second Circuit, federal appellate courts are uniform in employing only objective factors to determine whether to apply full deference under *Gilbert*[5] or limited deference under *Koster* and *Piper*. Pet. 17-22.

Respondents' efforts to show that there is no circuit split on the issue of objective versus subjective criteria (Opp. 19-21) are unavailing. First, respondents' assertion that no other circuits have considered the ruling below (Opp. 20) is irrelevant, given that the decision is only a few months old. Sec-

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[4] Respondents' reliance on *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), for the proposition that "while Petitioners take issue with the Second Circuit's noting of their possible forum shopping motives below, other Circuits do the same and even weigh this consideration more heavily" (Opp. 22) is puzzling. The court in *Pain* noted that in resolving *forum non conveniens* motions courts should "avoid implicitly sanctioning forum shopping by either litigant," 637 F.2d at 784; *see* Opp. 22. But that statement clearly appears in the context of a discussion of the history and policies underlying *forum non conveniens* doctrine. Far from giving any weight to subjective considerations, let alone "weigh[ing] this consideration more heavily" than did the Second Circuit, the court in *Pain* affirmed a *forum non conveniens* dismissal based on objective convenience factors *even though* it was "fully aware of the possibility that defendant here may in fact be engaging in a subtle form of 'reverse forum-shopping.'" 637 F.2d at 793.

[5] Respondents inexplicably assert that "[i]n *Gilbert*, this Court gave limited deference to plaintiff's choice of forum." Opp. 21 n.11. Respondents are incorrect. After giving full deference, by requiring a showing that the convenience factors weigh "strongly in favor" of dismissal, the Court reversed the Second Circuit and held that the district court's dismissal was appropriate. *Gilbert*, 330 U.S. at 509-12.

ond, respondents' discussion of two of the cases petitioners cited to demonstrate the circuit split (Opp. 20-21) fails to indicate why those cases are not, as cited, directly contrary to the motives-based approach of the Second Circuit. Those cases, plus the cited decisions of *eight other circuits* that respondents conveniently ignore, demonstrate quite clearly that appeals courts outside the Second Circuit have consistently applied either full or limited deference to a plaintiff's choice of forum, depending on whether the plaintiff was a forum resident or was suing in a representative capacity. Pet. 20-22. Thus, respondents fail to offer any plausible explanation for why this Court should not resolve the clear split of authority on this important issue of federal procedural law.

3. As a policy matter, the approach followed by this Court and ten circuits is vastly superior to that used below by the Second Circuit. Although respondents contend that this two-tier approach to deference would "deprive district courts of the 'flexibility' of the *forum non conveniens* analysis that this Court has found to be 'so valuable'" (Opp. 19 (citation omitted)), it is actually the ruling of the court below that undermines flexibility in deciding *forum non conveniens* motions. The decision below treats respondents' desire to have a United States court apply United States law as a key consideration weighing in favor of strong deference to their forum choice, as well as a critical public interest factor to which strong deference applies. At the same time, the decision below disregards established factors mandated by this Court as undermining any presumption of genuine convenience, such as the respondents' representative status and many respondents' foreign residence. This combination of overweighing and underweighing key considerations virtually ensures that transnational class actions with more than a de minimis connection to the United States will be litigated here. Some such actions, no doubt, should be litigated here, but not in the numbers that the Second Circuit's test will require, and certainly not for the reasons it has identified.

In contrast, the approach followed by this Court and ten other circuits commits that determination to the sound discretion of the district court. The district court properly afforded *some* weight to the interest of the United States in having its securities laws applied (Pet. App. 96a-98a), though not the virtually dispositive weight given it by the Second Circuit.[6] *Forum non conveniens* analysis can and should be flexible, but it must be based on the proper factors, and it must respect the discretion of the district court to weigh the public and private interests to evaluate *convenience*—not plaintiffs' preference for this country's substantive law.

II. Review Is Warranted To Resolve The Conflict Over The Deference Owed To A Class Action Plaintiff's Choice Of Forum

1. Secondarily, petitioners urge the Court to grant certiorari to review the conflict between this Court's *Koster* holding that the forum choice of representative plaintiffs must be afforded diminished deference and the court of appeals' holding here affording full deference to class plaintiffs' choice of forum. Although respondents assert that the Second Circuit "afforded the plaintiffs 'less deference'" in their choice of forum (Opp. 21), that view is flatly refuted by the record. The court below required petitioners to establish that the balance of convenience factors "strongly favors" dismissal and that "a trial in the United States would be so oppressive and

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[6] Respondents note that the Second Circuit held that the district court's balancing of the public interest factors was "clearly erroneous" because it purportedly failed to recognize the connections this case has to the United States. Opp. 22. The district court opinion plainly considered and addressed these points, however, including the express recognition that "PSC stock traded heavily on American stock exchanges and that many of the company's shareholders are U.S. citizens." Pet. App. 97a. Indeed, Judge Cabranes continued to dissent from the majority's reweighing of the district court's evaluation of the private and public interest factors. Pet. App. 21a-22a.

vexatious to them as to be out of all proportion to [respondents'] convenience." Pet. 10-11; Pet. App. 12a, 14a. As shown in the petition (Pet. 18, 26-27), that standard is precisely the standard for *undiminished* deference articulated in *Gilbert* and *Koster*. Indeed, where, as here, the putative class includes a substantial number of foreign citizens, as well as a substantial number of United States citizens who reside outside the forum, it is doubly inappropriate to afford the plaintiff's choice of forum full *Gilbert* deference.[7]

2. Respondents then suggest that certiorari should not be granted because the decision below is consistent with *Koster*. Opp. 23-24. As demonstrated above, however, *Koster* assigned only limited deference to the forum choice of a representative plaintiff. That decision conflicts with the Second Circuit's decision applying strong deference and requiring petitioners to show that the balance of convenience "strongly

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[7] Unlike respondents, the district courts are having no difficulty perceiving that the Second Circuit now applies a motives-based test for deference that trumps this Court's *Koster* holding on a plaintiff's representative status and requires strong deference to class plaintiffs' choice of forum. *See, e.g., In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 296-97 (E.D.N.Y. 2002); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, — F. Supp. 2d —, No. MDL 1374, M21-89 (MBM), 2002 WL 31133027, at *3 & n.2 (S.D.N.Y. Sept. 25, 2002) (Mukasey, C.J.) ("Given plaintiffs' legitimate reasons for bringing suit in this forum, and given defendants' representations to the MDL panel, plaintiffs' choice of forum is entitled to strong deference under the Circuit's sliding-scale approach in *Iragorri* [and] *DiRienzo II* . . . . notwithstanding the fact that plaintiffs are acting in a representative capacity."). One district court, citing *DiRienzo II* and denying a *forum non conveniens* motion, recited the following contradictory formula: although representative plaintiffs' choice of forum "is entitled to somewhat less deference," "defendant must nevertheless make a clear showing that litigation would be vexatious and oppressive out of all proportion to plaintiffs' convenience in order to overcome the presumption in favor of plaintiffs' choice of forum." *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, Nos. 01 Civ. 6554, MDL 1428(SAS), 2002 WL 1822741, at *8 (S.D.N.Y. Aug. 8, 2002). In the land of motives, limited deference equals . . . full deference.

favors" dismissal. Thus, this case falls squarely within the scope of this Court's Rule 10(c), authorizing a grant of certiorari where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."[8]

3. As the petition noted (Pet. 29-30 & nn.14-15), the district courts are sharply divided on the application of *Koster* to class action plaintiffs' choice of forum. Respondents contend that because there is no circuit split on the issue of the deference due the choice of forum by a securities class action plaintiff[9], "there is no justification for this Court's review of the decision below." Opp. 25.[10]

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[8] Respondents contend that by citing *Williams v. Green Bay & Western Railroad Co.*, 326 U.S. 549 (1946), *Koster* itself somehow recognizes a distinction between derivative and class actions for purposes of the degree of deference due a plaintiff's choice of forum (Opp. 27). *Williams*, however, held no more than that *forum non conveniens* dismissal is not available where the *only* factor supporting dismissal is that the defendant is incorporated under the law of another jurisdiction, and nothing in the decision addresses the appropriate level of deference. *Koster* cites *Williams* and another case solely to establish that dismissal is not required merely because a lawsuit may necessitate a review of the internal affairs of a corporation chartered in another jurisdiction.

[9] Respondents misstate the issue as whether *Koster* requires diminished deference only in the context of *securities* class actions. Opp. 23-28. To the contrary, the question presented encompasses all class actions, as there is no logical basis for varying the degree of deference to a representative plaintiff's choice of forum based on the substance of the underlying claim.

[10] Respondents cite *Taylor v. United States*, 493 U.S. 906, 907 (1989) (Stevens, J.), for the proposition that without a circuit split there is no basis for certiorari. Respondents neglect to disclose that *Taylor* is not an opinion of the Court, but rather the opinion of a single Justice commenting on a denial of certiorari. Moreover, in that case, the unpublished lower court decision had no precedential weight and would work no further mischief, because the same appellate court at the same time issued a published decision reaching the opposite result on the same issue.

Respondents ignore the text of this Court's Rule 10 as well as this Court's longstanding practice of resolving important issues of federal practice and procedure even in the absence of a divergence of lower court authority. Rule 10(a), for example, contemplates certiorari review where "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." And, as noted above, the conflict with *Koster* warrants certiorari under Rule 10(c). Moreover, if this Court considers the deference issue with respect to class actions potentially distinguishable from the derivative action context in *Koster*, Rule 10(c) authorizes certiorari review where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."

Review of the decision below is thus entirely consistent with this Court's certiorari jurisprudence. *See, e.g., Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (addressing propriety of self-transfer under 28 U.S.C. § 1407 even though lower court practice had been uniform); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (addressing applicability of Federal Rule of Civil Procedure 23 standards to settlement classes despite apparent absence of circuit split); *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari, *inter alia*, "because of the disarray among the Federal District Courts"). The district courts are deeply divided on the application of *Koster* to class actions, and this Court's guidance is needed to resolve this important issue of federal procedural law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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